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SUPREME COURT OF THE UNITED STATES.

No. ~~207.~~ 79

JOHN MINER, APPELLANT,

vs.

THOMAS PITTS, EXECUTOR OF H. NORTON STRONG, DECEASED, CLAIMANT OF THE BARQUE SUNNYSIDE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

FILED OCTOBER 22, 1874.

3 Allen 176
5 Ct. Mo 173
28 Michigan 82
7 Wisconsin

SUPREME COURT OF THE UNITED STATES.

No. 297.

JOHN MINER, APPELLANT,

vs.

THOMAS PITTS, EXECUTOR OF H. NORTON STRONG, DECEASED, CLAIMANT OF THE BARQUE SUNNYSIDE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MICHIGAN.

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1 In admiralty.

To the Hon. Ross Wilkins, judge of the U. S. district court for the eastern district of Michigan:

The libel of John Miner, prosecuting as owner, master, and agent for all concerned in the tug Wm. Goodnow, of the city of Detroit, in the State of Michigan, against the barque Sunnyside, whereof P. H. O'Neil is or lately was master, her boats, tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein, in a cause of collision, civil and maritime. And thereupon the said libelant doth allege and propound as follows:

First. That your libelant, at the time when the cause of action hereinafter stated arose, was the owner and master of the tug Wm. Goodnow, which said tug, as well as the aforesaid barque Sunnyside, were vessels of twenty tons burthen and upwards, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between ports and places, in different States and Territories, upon the lakes and navigable waters connecting said lakes, within the true meaning and intent of the act of Congress.

Second. That on the thirteenth day of June, A. D. 1869, the said tug Wm. Goodnow, being then, and also at the time of the collision hereinafter mentioned, tight, staunch, strong, and in every respect well manned, tackled, appareled, and appointed, and having the usual and necessary complement of officers and men stationed at their proper posts, and upon the lookout for the protection and safety of said vessel, left the port of Lexington, in the State of Michigan, about ten o'clock in the evening, in search of a tow, and that about half past eleven o'clock the same evening, when about three miles from land and about the same distance above Lexington, the engine was stopped and the tug hove to, and that she lay in this position, heading about east by north half north, in wait for a tow, until the collision hereinafter mentioned took place.

Third. That the night was clear and fine, with a brisk wind blowing from the southwest; that the lights of said tug were properly placed and burning brightly, and that during the night a large number of vessels showing their green lights passed up the lake between said tug and the Michigan shore.

Fourth. That about quarter past three o'clock on the following morning the said barque Sunnyside was descried from the tug coming up the lake, apparently in the track of the vessels which had preceded her, showing a green light, and bearing from two to three points off the starboard quarter of said tug; that when she had approached to within about 100 rods of said tug, showing enough of her broadside to indicate that unless she changed her course she would pass some distance astern of said tug, she suddenly kept off, and steered directly for
2 said tug, and very soon thereafter struck her on the starboard side, nearly abreast of her pilot-house, crushing in her timbers, and causing her to sink in about fifteen minutes.

Fifth. That the expense of raising the said tug, towing her to Detroit, and repairing her amounted to about the sum of ninety-five hundred dollars; that in making said repairs the said tug was necessarily laid up three and a half months, including the time consumed in raising her, during which she might have earned and been chartered for the
3 sum of thirty-six hundred dollars: said damage amounting in all to the sum of thirteen thousand one hundred dollars, for which

your libelant claims to have a lien upon said vessel, enforceable in this honorable court.

Sixth. That the aforesaid collision was occasioned solely by the negligence, unskillfulness, and carelessness of the persons navigating the said barque, and not by or through any fault, negligence, or improper conduct on the part of your libelant's said vessel, her master or crew.

Seventh. That since the aforesaid collision your libelant has applied, in a friendly manner, to the owner of the said barque and requested to settle for the damages sustained by your libelant as above mentioned, but the said owner refused to pay the said or any part thereof.

Eighth. That all and singular the premises are true, and that the said libellant was turned in at the time of said collision, and maketh oath to the facts upon said collision the information of those on watch at the time, which said libellant verily *Detroit in the district aforesaid* believes to be true.

Wherefore, your libelant prays that process in due form of law, according to the course and practice of this honorable court in cases of admiralty and maritime jurisdiction, may issue against the said barque Sunnyside, boats, tackle, apparel, and furniture; and that all persons having any interest therein may be cited to appear and answer all and singular the matters aforesaid; and that this honorable court will be pleased to decree the payment of the damages aforesaid, with costs, and that the said vessel may be condemned and sold to pay the same; and that your libelant may have such other and further relief as in law and justice they are entitled to receive.

(Signed) JOHN MINER.

(Signed) NEWBERRY, POND & BROWN,
Libelant's Proctors.

4 EASTERN DISTRICT OF MICHIGAN, *ss:*

Be it remembered that on this 29th day of September, A. D. 1869, before me, at Detroit, personally appeared the within-named John Miner and made solemn oath that he had heard read the foregoing libel and knows the contents thereof, and that the same is true as to his own knowledge, except as to those matters and things stated to be on his information and belief, and as to these matters and things he believes it to be true.

(Signed) ERVIN PALMER,
U. S. Commissioner.

EASTERN DISTRICT OF MICHIGAN, *ss:*

On reading and filing the foregoing libel, for sufficient cause therein appearing, and on motion of libelant's proctor, it is ordered that an attachment do issue for the seizure of the said boat, etc., and that the day of hearing be fixed for the Tuesday of at 10 o'clock a. m., if that be a day of jurisdiction; if not, on the next day of jurisdiction thereafter, at which time said process be made returnable.

Dated 18

District Judge.

(Indorsed:) No. 1250. District court of the United States for the eastern district of Michigan. In admiralty. John Miner vs. Barque Sunnyside, boats, tackle, apparel, and furniture. Libel for collision. Filed in clerk's office Sept. 29th, 1869. Jno. Winder, clerk. Attachment issued, returnable first Tuesday of Nov'r, 1869. Newberry, Pond & Brown, libelants' proctor.

5 *District court attachment.*

District court of the United States for the eastern district of Michigan, *ss:*

[L. S.] The President of the United States of America to the marshal of the eastern district of Michigan, greeting:

Whereas a libel hath been filed in the said district court of the United States for the eastern district of Michigan, on the 29th day of September, in the year of our Lord one thousand eight hundred and sixty-nine, by John Miner, owner of the tug Wm. Goodnow, against the barque Sunnyside, in an action for collision, claiming for damage done said tug by said barque on the 13th day of June, A. D. 1869, the sum of thirteen thousand one hundred dollars, for the reasons and causes in the said libel alleged and mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said barque or vessel, her tackle, etc., may be cited in general and special to answer the premises, and that all proceedings being had, that the said barque or vessel, her tackle, etc., may, for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libelant:

You are therefore hereby commanded to attach the said barque Sunnyside or vessel, her boats, tackle, etc., and to detain the same in your custody until the further order of the said court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the eastern district of Michigan, on the first Tuesday of November next, at ten o'clock of the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this writ.

Witness the honorable Ross Wilkins, judge of the district court of the United States for the eastern district of Michigan, at the district court room, in the city of Detroit, in the said district, this 29th day of September, in the year of our Lord one thousand eight hundred and sixty-nine, and of the Independence of the United States of America the ninety-fourth.

(Signed) JNO. WINDER, *Clerk*,
By WM. D. WILKINS,
Dep. Clerk.

6 EASTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify and return that, by virtue of the within writ, I did, on the 21st day of October, A. D. 1869, seize the within-named barque Sunnyside, her boats, tackle, apparel, and furniture, and now have the same in my custody to await the further order of the court in the premises.

(Signed) JOSEPH R. BENNET, *Marshal.*
By J. W. KAY, *Deputy.*

Service, 2.00; miles, 6—$2.06.

Paid for tug in making seizure—ship-keeper on board from , at $ per day. Bonded.

No. . District court of the United States for the eastern district of Michigan. In admiralty. Attachment. John Miner vs. Barque Sunnyside. Returnable Tuesday of , 187 . Returned and filed , 187 . , clerk. Newberry, Pond & Brown, libelant's proctor'.

7 To the hon'ble John W. Longyear, judge of the district court of the United States for the eastern district of Michigan.

Amendment to the libel of John Miner vs. The barque Sunnyside, her boats, tackle, apparel, and furniture.

First. Insert at the end of the 4th article of said libel the following words:

That said tug was then lying motionless upon the water and out of the track of vessels going up and down the lake. That, as your libellant is informed and believes, no proper lookout was kept upon the said barque, and that the said collision was occasioned by the failure of the officers and crew of said barque to see said tug, to discover that she was not in motion, and to take steps to avoid her.

(Signed) NEWB., POND & BROWN,
Libellant's Proctors.

8TH JUNE, 1872.

Filed June 8th, 1872.
(Signed) D. J. DAVISON, *Clk.*,
By JNO. GRAVES, *Dpty.*

8 (Indorsed:) No. 1250. U. S. district court for the eastern district of Michigan. John Miner vs. Barque Sunnyside. Amendment to libel. Filed June 8th, 1872. D. J. Davison, clerk, by Jno. Graves, dep'ty. Newb., Pond & Brown, libellant's proctors.

9 District court for the eastern district of Michigan, *ss:* In admiralty.

On this twenty-first day of October, in the year of our Lord one thousand eight hundred and sixty-nine, before me, William D. Wilkins, a commissioner duly appointed and empowered to take acknowledgments of bail, affidavits, and depositions, etc., within the eastern district of Michigan, in the matter of the libel and claim of John Miner, owner *owners* of the tug Wm. Goodnow, against the barque Sunnyside and her boats, tackle, apparel, &c., in a cause of collision, civil and maritime, moved and prosecuted in the district court of the United States for the district aforesaid;

Which day personally appeared H. Norton Strong, as claimant of the said barque Sunnyside, her boats, tackle, &c., and produced for surety H. Norton Strong and Hugh Coyne, of Detroit, in said district; and the said H. Norton Strong and Hugh Coyne, submitting themselves to the juris diction of the court, bound themselves, their heirs, executors, and administrators, in the sum of twenty-six thousand two hundred dollars, ($26,200,) *dollars* unto the said John Miner that the said H. Norton Strong shall abide and answer the decree of the said court in the aforesaid cause; and unless he shall so do, they do hereby severally consent that execution shall issue forth against them, their heirs, executors, and administrators, goods and chattels, lands and tenements, wherever the same may be found, to the value of the sum above mentioned.

(Signed) H. N. STRONG.
HUGH COYNE.

Taken and acknowledged by Strong, this 21st day of October, A. D. 1869, before me, Wm. D. Wilkins, U. S. commissioner 6th circuit and eastern district of Michigan.

Taken & acknowledged by Coyne on April 13, 1870, before me,

WM. D. WILKINS,
U. S. Commissioner.

EASTERN DISTRICT OF MICHIGAN, *ss:*

For the purposes of the suit referred to in the above bond, it is now stipulated and agreed by and between us, as parties thereto, that the cash value of the said above referred to is the sum of dollars.

Dated Detroit, , 187 .

10 EASTERN DISTRICT OF MICHIGAN, *ss:*

Appeared personally and made oath that worth the sum of of lawful money of the United States of America, after payment of just debts, in real estate, subject to execution within the eastern district of Michigan.

On the day of A. D. 187 , the said sworn to the truth of the above attestation, before me, U. S. commissioner, 6th circuit and eastern district of Michigan.

EASTERN DISTRICT OF MICHIGAN, *ss:*

I do hereby approve of the within bond, and of the sureties therein named, as sufficient.

Given under my hand at Detroit, in said district, this day of 18 .

U. S. District Judge of Michigan.

(Indorsed:) No. 1250, district court of the United States for the eastern district of Michigan, in admiralty. Stipulation to answer judgment. John Miner, owner of the tug Wm. Goodnow, vs. Barque Sunnyside, her boats, tackle, &c. Bond in $26,200, H. N. Strong, surety. Taken, acknowledged, and filed October 21st, 1869, Wm. D. Wilkins, dpt. clerk.

11 In admiralty, eastern district of Michigan.

The claim and answer of H. Norton Strong, owner of the barque Sunnyside, to the libel of John Miner, owner of the tug William Goodnow alleges as follows:

First. That said Strong is the sole, true, and bona fide owner of said barque, and that no other person is the owner thereof, and he hereby puts in his claim for the same.

Second. That he admits the allegations of the first article of said libel.

Third. That as to the second article of said libel, respondent denies that said tug had the usual and necessary complement of officers and men stationed at their proper posts, and on the lookout for the safety of their vessel, but is informed, and believes that it is true, that said tug lay with her engine stopped, as stated, heading eastward, in about the locality stated in said second article.

Fourth. That as to third article of said libel, respondent says that the statement in regard to the wind and the night he is informed and believes

to be substantially correct, but has no knowledge in respect to the other statements in said article.

12 Fifth. That as to the fourth article of said libel, respondent says that the same is untruly pleaded. That it is not true that said barque changed her course and kept off, as stated. That the facts are that said tug William Goodnow lay in the lake directly in the path of vessels, and where they were continually passing, with her engine stopped, but with steam up, without proper lights, with no lookout or officer on deck—a mere obstruction to navigation; and that said barque Sunnyside was passing up the lake at about 3 o'clock in the morning of May 14, 1869, heading north ½ west, under all sail, going steadily on her proper course with a stiff breeze from the southwest, and with her proper lights and officers properly stationed, and watch forward. That the bright and green lights of said tug were discovered a little on the port bow, indicating a steamboat standing to the eastward across the bows of said barque; that said barque was kept steadily on her course until it was certain there would be a collision, when the helm was ordered hard up, but before the order took effect the collision occurred, sinking said tug and causing serious damage to said barque, which respondent will recover by cross-libel.

Sixth. Respondent denies that any such damages resulted as
13 alleged in the fifth article of said libel.

Seventh. That the sixth article of said libel is utterly untrue, and that collision resulted solely from the aforesaid gross and criminal negligence of the person in charge of the said tug, and without fault on the part of said barque.

Wherefore respondent prays that said libel may be dismissed with costs.

(Signed) ALFRED RUSSEL,
Proctor, and of Counsel for Respondent.

(Signed) H. N. STRONG,
Respondent.

STATE OF MICHIGAN, WAYNE CO., *ss:*

Personally appeared before me, Henry C. Penny, a notary public for Wayne County, State of Michigan, H. N. Strong, known to be the person executing the above.

(Signed) HENRY C. PENNY.
Notary Public, Wayne Co., Mich.

October 30th, A. D. 1869.

Filed in clerk's office Oct. 30th, 1869.
(Signed) JNO. WINDER, *Clerk.*

14 (Indorsed:) Filed in clerk's office Oct. 30th, 1869. Jno. Winder, clerk.

15 In admiralty.

To the judge of the district court of the United States for the eastern district of Michigan:

The libel of H. Norton Strong of the city of Detroit, in the State of Michigan, against the steam-tug William Goodnow, whereof on' John Miner or one Allen is or lately was master, her boats, tackle, apparel, and furniture, and against all persons lawfully intervening for their interest therein, in a cause of collision, civil and maritime.

And thereupon the said libellant doth allege and propound as follows:

First. That your libellant, at the time when the cause of action hereinafter stated arose, was the owner of the barque Sunnyside, which said barque as well as the aforesaid tug William Goodnow were vessels of twenty tons burthen and upwards, enrolled and licensed for the coasting trade, and employed in the business of commerce and navigation between ports and places in different States and Territories upon the lakes and navigable waters connecting said lakes, within the true meaning and intent of the act of Congress.

Second. That on the eighth day of June, A. D. 1869, the said barque Sunnyside, being then, and also at the time of the collision hereinafter mentioned, tight, staunch, strong, and in every respect well manned, tackled, appareled, and appointed, and having the usual and necessary complement of officers and men stationed at their proper posts and upon the lookout, for the protection and safety of said vessel, left the port of Erie bound for the port of Chicago, with a cargo of coal, and on the morning of the 14th day of June, a little past 12 o'clock, having been towed out of the St. Clair River, made sail up Lake Huron, and laid her course north half west; wind southwest, a stiff breeze. That about three o'clock, the barque, heading as above, with all sail set, was proceeding on her course, a few miles off Lexington, in the usual frequented track of vessels, a bright and green light was discerned a little over the port bow, indicating a steamboat standing to the eastward. That said barque was kept steadily on her course until a collision was inevitable, when the helm of the barge was ordered hard up to ease the blow, if possible, but before said order could take effect the barque and tug collided, the latter being struck on her starboard side forward of the pilot-house, damaging said barque to the extent of fourteen thousand dollars, in the estimation of libellant. That libellant has since been informed, and believes it to be true, and charges, that said tug was lying floating in the water, a mere obstruction to navigation, with her engine stopped but with steam up, no lookout or officer on deck, and engineer absent from his post. And said libellant claims a lien upon said tug for the above-named amount, enforceable in this court.

16

17

Third. That the aforesaid collision was occasioned solely by the negligence, unskilfulness, and carelessness of the persons navigating the said tug, and not by or through any fault, negligence, or improper conduct on the part of your libellant, said vessel, her master or crew.

Fourth. That since the aforesaid collision your libellant has applied in a friendly manner to the owners of the said tug, and requested them to settle for the damages sustained by your libellant as above mentioned, but the said owners have refused to pay the same or any part thereof.

Wherefore your libellant prays that process in due form of law, according to the course and practice of this honorable court in cases of admiralty and maritime jurisdiction, may issue against the said tug William Goodnow, her boats, tackle, apparel, and furniture; and that all persons having any interest therein may be cited to appear and *ausnell* [answer] all and singular the matters aforesaid, and that this honorable court will be pleased to decree the payment of the damages aforesaid with costs, and that the said vessel may be condemned and sold to pay the same; and that your libellant may have such other and further relief as in law and justice they are entitled to receive.

18

(Signed) H. N. STRONG, *Libellant.*
(Signed) ALFRED RUSSEL,
Libellant's Proctor.

STATE OF MICHIGAN,
Wayne Co., ss:

Sworn and subscribed before me, Henry C. Penny, notary public for Wayne County, State of Michigan, this 30th day of October, A. D. 1869.

(Signed) HENRY C. PENNY,
Notary Public, Wayne Co., Mich.

Filed in clerk's office October 30th, 1869.

(Signed) JNO. WINDER, *Clerk.*

19 *District court attachment.*

District court of the United States for the eastern district of Michigan, *ss:*

[L. S.] The President of the United States of America to the marshal of the eastern district of Michigan, greeting:

Whereas a libel hath been filed in the said district court of the United States for the said eastern district of Michigan, on the 30th day of October, in the year of our Lord one thousand eight hundred and sixty-nine, by H. Norton Strong, owner of the barque Sunnyside, libellant, against the tug Wm. Goodnow and her engine, boats, & claiming for damages sustained by said barque Sunnyside on occasion of her having been run into and collided with by said tug on June 8th, 1869, on Lake Huron, the sum of fourteen thousand dollars, ($14,000,) for the reasons and causes in the said libel alleged and mentioned, and praying the usual process and monition of the said court in that behalf to be made, and that all persons interested in the said tug Wm. Goodnow or vessel, her tackle, etc., may be cited in general and special to answer the premises, and that all proceedings being had, that the said tug or vessel, her tackle, etc., may, for the causes in the said libel mentioned, be condemned and sold to pay the demands of the libelant:

You are therefore hereby commanded to attach the said tug Wm. Goodnow or vessel, her boats, tackle, etc., and to detain the same in your custody until the further order of the said court respecting the same, and to give due notice to all persons claiming the same, or knowing or having anything to say why the same should not be condemned and sold pursuant to the prayer of the said libel, that they be and appear before the said court, to be held in and for the said eastern district of Michigan, on the first Tuesday of December next, at ten o'clock of the forenoon of the same day, if the same shall be a day of jurisdiction, otherwise on the next day of jurisdiction thereafter, then and there to interpose a claim for the same, and to make their allegations in that behalf. And what you shall have done in the premises do you then and there make return thereof, together with this writ.

Witness the honorable Ross Wilkins, judge of the district court of the United States for the eastern district of Michigan, at the district court-room, in the city of Detroit, in the said district, this first day of November, in the year of our Lord one thousand eight hundred and sixty-nine, and of the Independence of the United States of America the ninety-fourth.

(Signed) JNO. WINDER, *Clerk,*
By WM. D. WILKINS, *Dep. Clerk.*

20 EASTERN DISTRICT OF MICHIGAN, *ss:*

I hereby certify and return that, by virtue of the within writ, I did, on the 6th day of November A. D. 1869, seize the within-named tug Wm. Goodnow, her engine, boats, tackle, apparel, and furniture, and now have the same in my custody, to await the further order of the court in the premises.

(Signed) JOSEPH R. BENNET, *Marshal*,
By J. W. KAY, *Deputy*.

Service, 2.00; miles, 12—$2.12.

Paid for tug in making seizure—ship-keeper on board from 6th of November, at $1.50 per day.

(Indorsed:) No. 1253. District court of the United States for the eastern district of Michigan. In admiralty. Attachment. H. Norton Strong, owner of barque Sunnyside, vs. tug Wm. Goodnow & her boats, tackle, &c. Returnable 1st Tuesday of Dec., 1869. Returned and filed , 187 . , clerk. Alfred Russel, libelant's proctor.

21 District court of the United States for the eastern district of Michigan. In admiralty.

H. NORTON STRONG, }
vs.
TUG WM. GOODNOW. }

EASTERN DISTRICT OF MICHIGAN, SS,
County of Wayne, ss:

John Miner, being duly sworn, saith that he is the owner of the said tug Wm. Goodnow, which is now under attachment for a collision with the barque Sunnyside, which took place in the waters of Lake Huron, on the 14th day of June last. Deponent further saith that at the time of said collision he was on board said tug, which was then lying still waiting for a tow; that said barque struck her with her stern, nearly abreast of her pilot-house, crushing in her timbers and causing her to sink in about 15 minutes. That the damage to said tug, including the expence of raising and repairing her, and her demurrage while under repairs, amounted to $13,100, for which sum deponent on the 29th day of September last libelled the said barque, which suit is now pending. Deponent further saith that on the 30th day of October last the said Strong, owner of said barque, filed his libel in this court against said tug, claiming damages for said collision to the amount of four-
22 teen thousand dollars. Deponent further saith that immediately after said collision he jumped on board said barque and took notice. of the damage; that it consisted only of breaking her head-gear, viz, her martingale, dolphin, striker, and stays, and twisting her cut-water and fancy-work a little to one side; that she proceeded on her voyage without delay, and, as deponent is informed and believes, has continued her regular trips since said collision without intermission for repairs. Deponent further saith that the master of said barque admitted to him that he lying on a sofa in the cabin at the time of said collision, and that he hardly felt the shock. Deponent further saith that the damage said barque could not possibly have exceeded two hundred dollars, according to his opinion.

(Signed) JOHN MINER.

Subscribed and sworn to before me this 13th day of November, A. D. 1869.

(Signed) HENRY A. HARMON,
Notary Public, Wayne Co., Mich.

COUNTY OF WAYNE, *ss:*

George Stomler, being duly sworn, saith that he was on the said tug Wm. Goodnow at the time of her collision with the barque Sun-
23 nyside, and jumped on board said barque after the collision; that all the damage he could see was the breaking of some of her head-gear and fancy-work, and that no injury appeared to be done her hull. Deponent further saith that he afterwards heard the master of said barque say (after she had made one or two trips) that said barque had scarcely been damaged at all by the collision. Deponent saith that said damage could not have exceeded two hundred dollars.

(Signed) GEORGE STOMLER.

Subscribed and sworn to this 13th day of November, A. D. 1869.
Before me,

(Signed) HENRY A. HARMON,
Notary Public, Wayne Co., Mich.

COUNTY OF WAYNE, *ss:*

James M. Ballentine, being duly sworn, saith that in a conversation with the master of the barque Sunnyside, shortly after her collision with the tug Goodnow, the said master told him that he was lying on a lounge in the cabin at the time of said collision, and that he did not feel any concussion; that he heard some confusion on deck, ran up, and could not then tell what was the matter until he looked under
24 her bows and saw the tug Goodnow lying there; that the damage to the barque was trifling, injuring merely his gilt-work forward, and breaking his martingale and bobstays, and twisting his cut-water a little. Deponent then asked him if it caused his vessel to leak, and he said it did not. Deponent further saith that about four weeks after said collision, in a conversation with H. Norton Strong, said Strong told him that if his barque was libelled he should also libel the tug; that deponent then asked him what he should libel her for, and he replied, "for obstructing navigation."

(Signed) JAMES M. BALLENTINE.

Sworn and subscribed to before me this 13th day of November, A. D. 1869.

(Signed) HENRY A. HARMON,
Notary Public, Wayne Co., Mich.

Filed in U. S. dist. clerk's office Nov. 15th, 1869.

(Signed) WM. D. WILKINS,
Dep. Clerk.

25 To the honorable Ross Wilkins, judge of the district court of the United States for the eastern district of Michigan:

John Miner, of Detroit, in the State of Michigan, owner of the tug Wm. Goodnow, her boats, tackle, apparel, and furniture, intervening for his interest therein, appears before the said court, and claims the said tug, her boats, tackle, apparel, and furniture, and states that he is the sole, true, and bona-fide owner thereof; and thereupon the said claim-

ant prays that this court will decree a restitution of the same to him, and otherwise right and justice to administer in the premises.

(Signed) JOHN MINER.

Subscribed & sworn to before me this 13th day of November, A. D. 1869.

(Signed) HENRY A. HARMON,
Notary Public, Wayne County, Mich.

Filed in clerk's office on Nov'r 13th, 1869.

(Signed) WM. D. WILKINS,
Dep. Clerk.

District court of the United States for the eastern district of Michigan, *ss:* In admiralty.

On this day of January, in the year of our Lord one thousand eight hundred and seventy, before me, William D. Wilkins, a commissioner duly appointed and empowered to take acknowledgements of bail, affidavits, and depositions, &c., within the district of Michigan, in the matter of the libel and claim of H. Norton Strong, owner of the barque
26 Sunnyside, her boats, tackle, &c., libellant, against the tug Goodnow, & her engine, boats, tackle, apparel, &c., in a cause of collision, civil and maritime, moved and prosecuted in the district court of the United States for the district aforesaid; which day personally appeared John Miner, of Detroit, as claimant of the said tug Goodnow, &c., her engine, boats, &c., and produced for surety , of Detroit, in said district, and the said John Miner, and, submitting themselves to the jurisdiction of the court, bound themselves, their heirs, executors, and administrators, in the sum of two thousand dollars, ($2,000,) *dollars*, unto the said H. Norton Strong, libellant as aforesaid, that the said John Miner, claimant, shall abide and answer the decree of the said court in the aforesaid cause; and unless he shall so do they do hereby severally consent that execution shall issue forth against them, their heirs, executors, and administrators, goods and chattels, lands and tenements, wheresoever the same may be found, to the value of the sum above mentioned.

(Signed) JOHN MINER.
GUY F. HINCHMAN.

Taken and acknowledged this day of January, A. D. 1870, before me.

(Signed) WM. D. WILKINS,
U. S. Commissioner, 6th Circuit and Eastern District of Michigan.

EASTERN DISTRICT OF MICHIGAN, *ss:*

For the purposes of the suit referred to in the above bond it is
27 now stipulated and agreed, by and between us, as parties thereto, that the bond of the said tug Goodnow, her engine, &c., above referred to, may be made in the sum of two thousand ($2,000) dollars.

Dated Detroit, November 27, 1869.

(Signed) ALFRED RUSSEL,
Libellant's Proctor.

NEWBERRY, POND & BROWN,
Proctors for Claimant.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Appeared personally, , of Detroit, and made oath that he is worth the sum of four thousand dollars, of lawful money of the United States of America, after payment of his just debts, in real estate, subject to execution, within the eastern district of Michigan.

(Signed) GUY F. HINCHMAN.

On the day of January, A. D. 1870, the said was sworn to the truth of the above attestation before me,

WM. D. WILKINS,

U. S. Commissioner 6th Circuit and Eastern District of Michigan.

EASTERN DISTRICT OF MICHIGAN, *ss:*

I do hereby approve of the within bond, and of the surety therein named as sufficient.

Given under my hand at Detroit, in said district, this day of January, 1870.

Dep. Collector Customs, Detroit District.

Taken, acknowledged, and filed January, 1870.

(Signed) WM. D. WILKINS,
Dep. Clerk.

28 U. S. district court, eastern district of Michigan. In admiralty.

H. NORTON STRONG, OWNER BARQUE SUNNYSIDE,
vs.
TUG WM. GOODNOW.

And now comes Alfred Russel, esqre., and withdraws his appearance as proctor for libellent.

(Signed) ALFRED RUSSEL.

Filed and entered May 2nd, 1870.

(Signed) D. J. DAVISON, *Clerk.*

29 In the district court of the United States for the eastern district of Michigan, *ss:* In admiralty.

JOHN MINER, OWNER OF THE TUG WM. GOODNOW,
vs.
THE BARK SUNNYSIDE.
No. 1250.

AND

H. NORTON STRONG, OWNER OF THE BARK Sunnyside,
vs.
THE TUG WM. GOODNOW.
And 1253.

Depositions of witnesses D. Swartout, A. P. Hagadorn, taken before W. D. Wilkins, U. S. commr., east. dist. of Michn., on Feby. 9th, & 1870, on behalf of said Miner, owner of said tug Goodnow, in presence of H. B. Brown, esqr., proctor for said tug Goodnow, and of Alfred Russell, esqr., proctor for said Strong, owner of said bark Sunnyside, said Russell, on behalf of said Strong, waiving all objections to said depositions on the ground of irregularity, or informality, or insufficient notice, & saving & reserving all objections thereto on the ground of relevancy or competency.

And the said DENNIS SWARTOUT, being 43 years of age, & having been by me first carefully examined & cautioned & duly sworn

30 to testify the truth, the whole truth, & nothing but the truth in the above matter of controversy, did depose & say as follows, to wit: I live in Algona, Michn.; am a sailor; have sailed 14 years, partly as mate, and most of the time as master; about 10 years as master. In June, 1869, I was mate of the tug Wm. Goodnow, owned & commanded by Capt. Jno. Miner. Remember collision on or about June 14, 1869, between tug Goodnow & bark Sunnyside. We had been lying at Lexington on Sunday, & left there about 10 o'clock p. m. I was turned in at the time. At 12 o'clock I was called & came on deck. The tug was lying still at the time about three miles above Lexington, & three (3) miles from shore. She was heading E. by N. ½ N. She had no anchor out; was drifting and lying there waiting for a tow. When I came on deck Capt. Miner told me to look out & see if I could see any tugs past and go to them. (Conversations on board objected to by opposing counsel as not forming part of res gestive of the collision.) He wanted me to find out when our turn came to pick up a tow.

31 I saw no lights for about an hour after I came on watch; then the vessels began to come up the lake, showing their green lights. (Testimony as to movements or locations of vessels other than the colliding vessels objected to as irrelevant.) The wind was S. W., a 12-knot breeze. About 2 o'clock there was a squad of vessels comes, about 10 or 15; they seemed to all come in a bunch, as if they had all been towed out together. They were all showing green lights but one, and she showed me a red light for about 2 minutes, and then passed under our stern. They passed astern of us from ⅛th to ¼th of a mile. They then came along but seldom, and all went under our stern that did come. A few minutes before the collision I was standing on our quarter-deck, and the lookout man reported "Another vessel coming." I said, "Yes; I see it;" and in a minute he said, "There's another one," & I said, "Yes; I see it." This last proved to be the vessel Sunnyside. I stood there & watched the Sunnyside coming up, & showing me her green light, until she got up within 100 rods, or thereabouts;

32 maybe a little more or less; I turned round, & looking forward I saw a light off our port bow which I supposed to be a tug. I turned round again, & looking at the Sunnyside I saw that she was going all clear of us. I looked at her starboard broadside, and I could make her out to be a black, loaded bark, she was that close, and following up another one, about a mile or two ahead of her. I started forward, taking my eyes off the Sunnyside to see another vessel that was forward, as I couldn't see from where I was, forward, very well, owing to the wood that was piled there. When I got about midships, standing on the rail, holding on to the stay-chain-pipe, the first thing I saw was her jib-boom coming over the tug just forward of the pilot-house. It listed the tug over and rail under, and in a very few minutes she righted up, and I got on the upper deck as quick as I could. I saw the position we were in, & sung out to them on the vessel to "hard-up" in order to get the vessel away from us. I got no answer for a few minutes, until I saw a man coming from towards the

33 cabin, who appeared to be in his stocking feet without any coat on. I sung out a number of times, and then I sung out to the man at the bark's wheel to "hard-up." About this time Capt. Miner came on deck and took charge of the affair. The tug sunk in about 15 or 20 minutes.

It was a good night; starlight; occasionally a little cloudy. The collision was about 3 o'clock a. m., or a little after. It was getting day, so that I could see up to northward & eastward; I could see a tug a mile

off in that direction if she had no lights. Towards the southwest you couldn't see so well. It was still dark to southward & westward. Don't know the vessel ahead of the Sunnyside. It was a big white bark, apparently light. She passed astern of us from $\frac{1}{8}$th to $\frac{1}{4}$th of a mile. When I went forward I could see the hull of the Sunnyside, & that she was a black bark, and appeared to be loaded deep.

Qu. How did she bear at the time you went forward?

Answ. If we had been heading up the lake, on our course, she would have bore about 2 points on our port quarter.

34 Quest. What did her course appear to be?

Ans. She appeared to be steering about N. & by W. up the lake, I should think. Her course appeared to be right after the course of the white bark.

Qu. State whether, in your opinion, if she had kept the course she was on when you saw her as you went forward, she would have passed astern of you, & how far.

Answ. She would have passed astern of us $\frac{1}{4}$ of a mile, at least. She appeared, when I last saw her, to be luffing up a very little, & keeping up nearer to the land; hence I judged she would pass nearer to the land than the white bark would. When I went forward I could see the length of her starboard side. She was then about 700 rods distant; she appeared to have all her sails & studding-sails set. I never saw her red light until after the collision. When the bark struck us I saw no one on her deck. The first man I saw was one I supposed to be the mate coming forward, in his socks, from the cabin; didn't know he was the mate. He was about 5$\frac{1}{2}$ feet high. He sung out to the man

35 at the wheel, & gave orders on the vessel. Saw others on the vessel in a very few minutes. I

Qu. If there had been a lookout forward, would you have seen him?

Ans. I should after I had got on to the upper deck of the tug. The vessel was on her port tack. The wind was over her quarter so that everything would pull; the canvas was all on her starboard side. The tug's rudder was lashed to starboard. While we were laying our heading was pretty steady.

Ques. State what you know with regard to the Goodnow's engine—with regard to the ability to start it, &c.

(Question withdrawn for the present.)

We were drifting probably 2 miles an hour—drifting in a N. E. direction.

Qu. How long would it take to start the tug up & get out of the way?

Answ. It would have taken a minute to do that with the tug Goodnow; she was the worst boat to get started I ever saw. I saw no other vessel in the neighborhood, except that light I went to look after, which was about 3 miles off. Saw nothing except those vessels that passed up, as above stated, and this vessel.

Qu. When she hit you, was the blow from forward or aft, or square on?

Ans. It was from aft, a little quartering.

36 Qu. Had your tug changed her heading from the time you last saw the bark up to the time of the collision?

Answ. Not that I noticed. We had our lights on the tug all burning—two colored and two white lights. I know we had these lights. Our head light could not have been seen from aft; our colored lights were large lens lights, good lights, properly screened, & brightly burning. Our stern-light was a large globe-light, such as tugs always use, hung up about seven feet from the deck; it was not obstructed from any direction, except by the pole on which it hung; it was hung aft the

pole; it was burning well that night. I noticed all our lights about 3 minutes before the collision. Our lookout was a young man named Tommy; don't know where he lives. The last I saw him he was standing on the upper deck by the flag-pole, when he reported the Sunnyside to me.

(All cross-examination is now objected to, on the ground that the claimant has not furnished sureties, as heretofore ordered by the district court in this cause.)

Cross-examination:

When I first saw the Sunnyside's lights I was standing on our
37 quarter-deck, aft. I was officer of the deck.

Ques. What were you aft for?

Answ. It is the only good place to walk round when the boat is wooded. You can see as well there as any other place. The lookout, engineer, fireman, & myself were on deck, & whether our wheelsman was on deck or not at the time I do not recollect. I can't give names of watch, as I had only been on deck a few days. Geo. Stromley & Aaron Haggerty were engineers. I don't think vessels coming from the southward could have seen any more than one white light. They might have seen our green light; I can't say.

Ques. What is the reason you can't say?

Answ. I couldn't say just how the vessel was bearing. She might have been bearing up so that her screen would hide her green light to vessels coming up & heading in-shore from us, especially when they get close to us. I did not look at our compass any time during my watch, that I recollect.

Ques. Can you tell, with any degree of accuracy, how she was heading?

Answ. I cannot tell to a certainty, but by guessing at it I can tell to within a point.

38 Ques. You speak of seeing a vessel with a red light. What lights did you exhibit to that vessel?

Answ. She probably saw two white lights & a green light.

Quest. How did you make that red light?

Answ. I should think it bore about S. E. from us, right down the lake.

Quest. How many points over your starboard bow did you make that red light?

Answ. I should say she was S. & by E., & we were heading about E. & by N. or ½ N. I was on the upper deck when I made the red light, and took hold of the bell-rope to start the tug up. Capt. Miner stuck his head out and wanted to know what was up. I told him there was a vessel coming I didn't like the action of. Just then the vessel showed me her green light, & he said "She's all right." Don't know what fetched Miner out. The bell-rope goes down through his room, & you let go the bight of it & it goes down in front of his bunk. Whether this brought him out or not I don't know. I was going to get out of the way of that fellow with the red light by starting up the tug, if he kept dodging around in that kind of style.

Ques. When you went forward, after you stopped looking at the "Sunnyside" light—when you say she luffed up into the wind—
39 did you go forward on the port or starboard side?

Answer. On the port side. Don't recollect speaking with any of the hands on the way. I went forward to about amidships. After he reported "there comes another one" the lookout did not report anything about the Sunnyside's light. I cannot tell what kind of a light I saw over our port bow that caused me to go forward; it was getting

a little light in that quarter, & you couldn't distinguish the color. At moment of collision I was standing on the rails, on the port side, about amidships.

Ques. How long were you watching the light forward after you went forward?

Answ. I might have stood there a minute; it was but a very short time.

Ques. Did you exchange any conversation about the Sunnyside's light after the lookout mentioned it to you?

Answ. Yes; I think I said, "There comes another one showing a green light."

Ques. How could any approaching vessel determine that you were not standing to the eastward with your engines running, & under way as usual?

Answ. Don't know as they could. If they had seen her green light, they would have known which way she was heading, but could
40 not tell whether we were moving or lying still until they got close to us. If they had seen our white light, they would have known we were lying still.

The Goodnow was the only vessel I was on this season. I sailed no more. The preceding season I was 5 months on tug Satellite, & balance of season on tug Eclipse. H. N. Strong owned the Satellite. I left her for higher wages. The season preceding that I was on the tug Eagle, I think for the entire season; no, was on her till Septr., & balance of season on tug Winslow. I left the Eagle because she wasn't making any money, & they laid her up. Never was discharged from but one boat, the John Martin, for fourteen years; left there because I & the engineer had not the same views, & one of us had to leave, & I left.

Ques. How do you consider your tug should be manned, carrying the lights you did at the time of collision?

Answ. With men enough to work the tug.

Ques. State how they should be stationed.

Answ. There should be a man ready to take the wheel; a captain or mate ready to ring the bell or speak to the engineer about the engine; a fireman on deck to fire up if necessary. Think that's all that's necessary to handle a tug-boat; of course the engineer should be ready to handle the engine, which ours was.

41 Quest. Did you have any wheelsman at the wheel at the time of collision?

Answ. No, sir; it wasn't necessary to have a wheelsman when her wheel was fastened.

Quest. Did your tug make any effort to avoid a collision; if so, what?

Answ. She never turned a wheel.

Quest. Had you steam on?

Answ. Yes, sir; we had.

Redirect examination:

Quest. Was the vessel whose red light you saw and referred to the Sunnyside?

Answ. No, sir; it was not.

Quest. How far was that vessel from you when she showed her green light?

Answ. She must have been half a mile when she shifted her course, and went under our stern about an eighth of a mile. She went the closest to us of any vessel that night.

Ques. Had you & your lookout had your usual sleep before going on watch that night?

Answ. Yes, sir.

Quest. Had you a full crew for waiting for vessels that night?

Answ. Yes, sir; we had.

Quest. Heading as you were out into the lake, to a vessel passing up the lake on her course, would there be any difficulty in telling by
42 your stern-light whether you were moving or lying still?

(Quest. objected to as leading.)

Answ. If she saw our stern-light, and no other, she must have known we were laying still.

Quest. How far could the hull of your tug have been seen that night at the time of the collision?

Answ. She could have been seen a mile to one looking to the east or northeast.

(Signed) D. SWARTOUT.

Sworn & subscribed to before me on Feb. 9, 1870.

(Signed) WM. D. WILKINS,
U. S. Commr. E. Dist. Mich'n.

MEMO.—Fees: 1 day & 40 miles, $5.50.

And the said AARON P. HAGADORN, being about 23 years old, & having been by me first carefully examined & cautioned, & duly sworn to testify the truth, the whole truth, & nothing but the truth in the above matter of controvesy, did thereupon depose and say as follows, to wit:

Live about three (3) miles from Algonac. Am an engineer. Have had an engineer's papers since July, 1859. Have been acting as engineer and fireman about 3 years. Was on tug Goodnow at time of collision in question, and was on duty; went on at 12 o'clock. We had steam up, between 40 & 50 lbs. To have got our tug under full headway
43 would have taken from 5 to 10 minutes; not less than 5 minutes.

I didn't see the Sunnyside before the collision. It was middling light; you could see a vessel about a mile and a half off, & could see the shore; we were about 3 miles from the shore. I observed our lights were burning bright. They were still burning when we got off on the bark. When the tug stands still that way water gets into her cylinder, and we cannot start her rapidly. There is danger of blowing the cylinder-head off by starting quick. Our fireman was on duty at the time. The Sunnyside struck us from aft.

(Signed) A. P. HAGADORN.

Sworn & subscribed before me on Feb. 9, 1870.

(Signed) WM. D. WILKINS,
U. S. Commr. East. Dist. of Mich.

Memo.—Fees: 1 day, 40 miles, $5.50.

Examination here adjourned by consent until , on which day, to wit, on , at my office, both said counsel present, the said , being about years old, & having been by me first carefully examined & cautioned & duly sworn to testify the truth, the whole truth, & nothing but the truth, in the above matter of controversy, did thereupon depose and say as follows:

44

45 UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

I, William D. Wilkins, a commissioner duly appointed by the circuit court of the United States for the sixth circuit and eastern district of Michigan, under and by virtue of the act of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes pending in the courts of the United States," passed February 20th, 1812, and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in civil causes pending in the courts of the United States,' passed March 1st, 1817, and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify that the reason for taking the foregoing depositions is, and the fact is, that the testimony of Swartout, Hagadorn, is material and necessary in the cause the title whereof is in the caption of said depositions named, and pending in the district court of the United States for the eastern district of Michigan.

46 I further certify that a notification of the time and place of taking the said depositions, signed by me, was made out and served on the proctor for the said bark Sunnyside, Alfred Russell, to be present at the taking of the said deposition, and to put interrogatories, if he or they might think fit.

I further certify that on the 9th of February, & on the days thereafter named, in the year of our Lord one thousand eight hundred and seventy, I was attended by Henry B. Brown, esqr., proctor for said tug Goodnow, by Alfred Russell, esqr., proctor for the bark Sunnyside, and by the witnesses aforesaid, who were of sound mind and of lawful age; and, the witnesses being by me first carefully examined and cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, and their depositions being by me reduced to writing in the presence of the witnesses aforesaid and from their statements, and after carefully reading the same to the witnesses they each subscribed the same in my presence.

I have retained the said depositions in my possession of delivering the same with my own hand to the court for which the same were taken; and I certify that the same will be retained by me until I shall deliver the same with my own hand to the clerk of the U. S. dist. court E. dist. Mich., at Detroit, Michigan, the place where the said depositions were taken.

47 And I do further certify that I am not of counsel nor attorney for either of the parties in the said depositions and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof I have hereunto set my hand and seal this thirty-first day of March, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States of America the ninety-fourth.

[L. S.] Signed WM. D. WILKINS,
United States Commissioner,
duly appointed by the Circuit Court of the United States
for the Sixth Circuit and Eastern District of Michigan.

UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

I, William D. Wilkins, clerk of the circuit court of the United States for the sixth circuit and eastern district of Michigan, do hereby certify

that I am well acquainted with the handwriting of William D. Wilkins whose name is subscribed to the annexed deposition, and that the signature to the same is in his proper handwriting. And I do further certify that he was at the time of signing the same a United States commissioner, duly appointed, under and by virtue of the acts of Congress in such behalf made and provided, by the circuit court of the United States of America for the sixth circuit and eastern district of Michigan.

In testimony thereof I have hereunto subscribed my name and affixed the seal of the said circuit court, at Detroit, in said eastern dis-
48 trict of Michigan, this thirty-first day of March, in the year of our Lord one thousand eight hundred and seventy.

[L. S.] (Signed) WM. D. WILKINS,
Clerk.

Costs taxable on above depositions: Commissioner, $12.70; witnesses, 11.00—$23.70.

(Endorsed:) No. 1250 & 1253. U. S. district court eastern district of Michigan. In admiralty. John Miner vs. Barque Sunnyside, and H. N. Strong vs. Tug Goodnow. Depositions on behalf of the Goodnow of Swartwort, Hagadorn, taken at Detriot, Mich., before W. D. Wilkins, U. S. comm. Recieved from U. S. comm. & filed on March 31st, 1870. (Signed) Wm. D. Wilkins, dep. clerk. Commr., $12.70; witnesses, $11.00.

On behalf of Sunnyside.

In the district court of the United States for the eastern district of Michigan, *ss.* In admiralty.

JOHN MINER, OWNER OF THE TUG GOODNOW,
vs.
THE BARQUE SUNNYSIDE,

AND

H. NORTON STRONG, OWNER OF THE BARQUE SUNNYSIDE,
vs.
THE TUG WM. GOODNOW.

Depositions of witnesses Peter Bell, Joseph Frahes, Geo. Irving, Nicholas Smith, Gordon Campbell, Francis Shepards, taken before
49 Wm. D. Wilkins, U. S. commissioner east. dist. of Michigan, in Feb. 23d, March 1st, 1870, on behalf of said Strong, owner of said barque Sunnyside, in presence of Alfred Russel, esqre., proctor for said owner of barque Sunnyside, & of H. B. Brown, esqre., proctor for said owner of tug Goodnow. Said Brown, on behalf of said Miner, owner of said tug Goodnow, waiving all objection on the ground of irregularity, or informality, or insufficient notice, & saving & reserving all objections thereto on the ground of relevancy or competency.

And the said PETER BELL, being about 36 years old, & having been by me first carefully examined & cautioned & duly sworn to testify the truth, the whole truth, & nothing but the truth, in the above matter of controversy, did thereupon depose, testify, and say as follows:

I have been a sailor since I was 16 years old; commenced on salt

water; have been in East & West Indies, Australia, round the Horn, &c.; served apprenticeship five years; then was a sailor, then 3d & 2d mates while on salt water; have been on the lakes 13 years next spring; first sailed on the lakes on schr. Autocrat as seaman, & after one voyage became her 2d mate; have served since before the mast as 2d mate, & was three years mate of the schr. Colton; had been on Sunnyside on season of collision since that spring as 1st mate. At time of collision she was bound from Erie to Chicago with a full load, drawing about 12½ feet water. About time of collision we were in Lake Huron, in the neighborhood of Lexington. My watch commenced at 12 o'clock night; after leaving the mouth of river, the capt. gave the course N. ½ W., & we steered it all along. The wind was about S. S. W., about a 9-knot breeze. The vessel was going about nine miles an hour.

50 When we first saw tug Goodnow we were heading on our course N. ½ W. We made the tug's green light and her forward bright light. When I saw those two lights I saw she was a steamboat of some kind, & she was apparently heading to the eastward. I made her lights from ½ a point to 1 point (not much more than ½ a point) over our port-bow. The lookout-man sung out to me, & I ran forward & saw. Our lookout was Joseph Fratus; he was stationed on the top-gallant forecastle in the foreward part of the vessel. When he called me I was walking aft, looking to leeward under the mainsail for lights, & likewise watching the compass and seeing that the vessel was kept on her course. I give my heading from the compass. Nicholas Smith was then at the wheel. The wheelsman and lookout were both good, competent men. There was another man on deck coiling up the ropes after making sail; his name was John Nichols. We were under full canvass. Our yards were pretty near square; booms on starboard side; the mizzen-boom was hauled pretty near square out. We had good lights, burning good, and in proper places; red on port, green on starboard. We carry no bright light for signals. Had also a bright light on each side of binnacle. When we made tug's light, it was a cloudy night, no moon. I think you could see a star once in a while when it was clear. You could not see a vessel's hull but a mighty little distance—a very short distance. When the lookout first called my attention to her, the tug was from 1½ to 2 miles distant; she might have been nearer when wheelsman first reported her. I gave no orders to wheelman; told lookout I supposed it was a steamer, & guessed she would take care of herself. I

51 then went aft, & looked at a couple of red lights I made over starboard beam, nearly forward of beam, I saw of vessels standing to westward, and pretty near us, to see if we would go clear of them or not. There were also several other lights further off. At the same time I was looking out expecting to see this tug's lights to leeward, as I supposed she was standing to the eastward, (the way she was heading when I saw her lights,) and would cross our course. We must have exhibited our port (red) lights to the tug when I first saw her; don't think they ever saw the other light until they saw it on deck in the morning. In my opinion the red lights which I saw to the leeward must have been visible to the tug. Our lights were extraordinary good lights—the old-fashioned lens-lights. The next I heard of the tug was when the lookout man sung out to me that the light was close under the bow. I shouted to the man at the wheel, "Hard up;" that is, to put his wheel hard to port. I shouted as I was running, and I could see him in the motion of heaving his wheel. Then, as I ran up the three steps leading up onto the forecastle, and got onto the forecastle, the vessels struck. When I heard the report of the lookout, and commenced to run for-

ward, I was about 15 feet abaft the mainmast. I had to run between 80 & 90 feet from where I commenced to the top of the top-gallant forecastle. There was no change in the vessel's course from the time I first saw the light until the collision. Whenever I looked at the compass (and I looked at it pretty often) she was exactly on her course. I passed the compass every time I walked across the deck from side to side, which is the way I walk at night when on watch. The collision was inevitable. When I gave the order to hard up, the vessel had then
52 no time to swing off. My impression is that we struck the tug square. I didn't examine that much. We struck her forward of square, if anything, but I won't be positive. The tug appeared to be heading eastward at time of collision. I could at that time see her bright light & green light. I never saw her red light at all. We struck her on the starboard side forward of the pilot-house. In my opinion there was nothing that could have been done to avoid the collision on our part. I was told by a captain that I formerly served with that if a steamboat was in my way to run right over them.

Ques. Do you mean by that anything more than that you were instructed by the captain you were with then that the vessel must keep her course at all events in meeting a steamer?

(Objected to by Goodnow's proctor as leading.)

Answ. Yes, sir, that is what I've been taught. After the collision the capt. (McNeill) came on deck, & took charge, & took in sail. We gave the tug ropes, and took off her crew while we took in our sail, and afterwards put the tug's crew on the tug John Martin. The tug sunk in 10 or 12 minutes after collision.

Ques. State whether, in your opinion, there was any way in which it was possible for you to tell that a steamer bearing such lights as that tug did was not under headway.

Answ. It was my impression that she was under headway. There was no way for me to tell she was not under headway. If she had been under headway, she would have showed the same lights, heading the same way. We were on the usual course of vessels passing up
53 the lake. Our bow stands very high out of the water forward, even when she is loaded.

Cross-examined:

I live in Chicago. Last year I lived there also. Am no more acquainted with our lookout than from having him in the vessel. He is here to-day. On our course up the lake we were sailing about 5 miles distant from shore. I did not notice other vessels going up the lake ahead of me. We had our wind from a point & a half on our port quarter to pretty near dead aft. Forward of the foremast's sails & outward we had spread our two jibs, the main & flying jib; they were amidships at the time, & flapping from one side to the other, as the wind had no effect upon them. When the lookout sung out about the tug's light first, he sung out, "Light ahead, a little on the port bow." I then ran to the top-gallant forecastle. That is elevated three steps above the main deck. When I'm in a hurry I can take it in one step. It is in the extreme forward part of the vessel. The first time I stood there a minute or less, was looking at her part of the time while there, & part of the time looking at other lights going under the lee bow. The light for a sail-vessel at anchor is a bright light. Cannot say what is the light for a tug at anchor; never saw a tug at anchor; suppose it is one bright light, or two, and a colored light if under way. The lights she bore indicated that she was going across our course. If she had been moving

I wouldn't have noticed it by looking at her lights. I would have noticed it in crossing our bows; could have noticed it in crossing our jib-boom. I could have noticed she was moving in that way, but I did not stay there long enough. I looked at her & saw she was a steamboat,
54 & thought she had lots of room to go clear of us. I looked at her long enough to see she was a steamboat, & that was all. I had other lights to look out for as well as hers.

Ques. If she had been sailing across your course, and you had looked at her long enough, you could have seen that she was in motion, couldn't you?

Ans. Yes, I could have seen so if I had waited for vessels to leeward to run into us.

Ques. How long would it take you to tell she was in motion?

Ans. Probably 3 or 4 or 5 minutes. I would have to catch her lights in some object and see she was in motion.

Ques. Would it take 3 or 4 minutes to tell a vessel was in motion moving across your course?

Ans. Yes, it would in a dark night. We have to fetch the lights into some object to tell she was in motion.

Ques. What object could you fetch her in in a dark night?

Ans. We would have to wait until you could get something, the vessel's jib-boom, or for a star to come out close down to the horizon.

Ques. Do you mean to say that you can't tell by the light itself whether it is in motion across your course?

Ans. No, sir; not until you get some object with it. It was three or 4 minutes after I left the forecastle that the lookout called me again. To the leeward there were two red lights, and, perhaps further off, ½ a dozen other lights of different colors, some green & some red, when I gave the order hard aport; when the lookout sung out the second time it was to try to avoid the collision by all means. At this time the tug was somewhere about the end of our jib-boom. I was looking out
55 to save my vessel as much as possible, and the tug at the same time. This was about 3 o'clock in the morning. I was on deck all the time, from 12 o'clock to the time of the collision; didn't go below at all until breakfast-time. If I knew a steamboat was at anchor I would take means to avoid her by all means. I would not consider it to be my duty to run over a steamboat that I knew was not at anchor. I always try to avoid collisions, & never had one before. From the time I left the vessel until the order hard aport, or until I saw her under our jib-boom, I couldn't see the tug's light, standing as I was on the after-part of our deck. I was expecting to see her go by to leeward, and was looking to see her go by, as well as other lights. There were no other lights right ahead at that time.

Redirect-examination:

I have sailed with Capt. O'Neil four seasons, & a part of another. Was 2nd mate with him one season & mate with him for 3 seasons. I suppose that John Nichols is now on salt-water. I was in Geo. W. Bessel's employ for 6 or 7 seasons, and mate on his barque L. H. Potter for 3 seasons. I had known Trastus, the lookout, for two seasons. Had had him the previous season, & known him for two years.

(Signed) PETER BELL.

Sworn and subscribed before me on Feb. 23, 1870.

WM. D. WILKINS,
U. S. Comm., East Dist. Mich.

MEMS.—1 day & 284 miles, $29.90.

And the said JOSEPH FRATUS, being about 34 years old, & having been by me first carefully examined & cautioned, & duly sworn
56 to testify the truth, the whole truth, & nothing but the truth in the above matter of controversy, did depose and say as follows:

Have been a mariner 18 years. Am a Portuguese. Have sailed on the lakes for four years next spring. Have been 14 or 15 years on American vessels on salt water. I shipped on the Sunnyside in spring of 1869. Was lookout on her at the time of her collision with the tug Goodnow. When I first saw the tug I made her green light and bright light; made them over the port-bow, about ½ a point; can't say exactly when I saw them. I was standing on the top-gallant forecastle, which is elevated three steps above the main deck. I reported the lights to Mr. Bele, the officer of the deck. He came forward & looked at it. He remained with me 3 to 5 minutes. The vessel shearing, the green & bright light appeared to be heading to the eastward. I couldn't tell if she was in motion. Our vessel continued straight on her course from that time until the collision. I could see no change in the position of these lights on the tug until collision. Could see a vessel's hull on that night about a mile or ½ a mile distant on that night; it was quite cloudy. I reported the light a second time to the mate, because she was so close. I thought it was (as the mate had told me) a steamer bound eastward. After reporting the second time, the mate ran forward, and as he ran he hollered to the man at the wheel to put the helm to port. At the time we struck I could see the same lights on the tug that I had seen from the first. Nicholas Smith was at our vessel's wheel. There was no time to get out of the way when our wheel was put to port. Our vessel had no time to swing off. We hit the tug for-
57 ward of the pilot-house, pretty near square. I saw no moon that night. It was once and a while clear overhead. Don't recollect seeing the shore at all. I have been on lookout before while on watch, taking my regular turns.

Cross-examined:

The jib-sails did not interfere at all with my keeping a lookout ahead. I saw the tug on the left-hand side of this sail. From the time I saw her she kept on our port-bow, and drifted. I was looking at other passing and approaching lights also, at the same time. After I sang out the second time, the tug appeared to be drifting. I saw no one on her deck until a man ran out from her cabin in his drawers. I didn't take any notice of her after the mate left the forecastle, but kept looking out for other vessels.

Ques. The mate told you, didn't he, that you needn't mind her, because she was a tug?

Ans. He said she was a steamer going to the eastward, and she was all right. I looked for other vessels and paid no further attention to her until I saw her close under our jib-boom.

Redirect examination:

Ques. As a general thing, when a lookout has reported a light once to the officer of the deck, is he required to report the same light a second time?

Ans. No, sir; I do not think *it* is.

Ques. If there is any change in that light, does it then become the duty of the lookout to report the change?

(Question objected to by Goodnow's proctor as leading.)
Ans. Yes, sir; it does.

58 (Signed) his JOSEPH + FRASTUS. mark.

Sworn & subscribed before me Feb. 23, 1870.

WM. D. WILKINS,
U. S. Comr. East. Dist. Mich.

Mems.—Fees 1 day, 284 miles, $29.90.

And the said NICHOLAS SMITH, being 33 years old, & having been by me first carefully examined & cautioned, & duly sworn to testify the truth, the whole truth, & nothing but the truth in the above matter of controversy, did depose & say as follows:

Am a native of Greece. Have been a sailor since 14 years of age. Have sailed all over the world. Have sailed on the lakes about 2½ years. I was wheelsman on barque Sunnyside at time of her collision with tug Goodnow. Took the wheel at 2 o'clock a. m. Got the course from the man I relieved of "N. ¼ W." I kept our vessel steady on that course since I took the wheel up to the time of the collision, when the mate ordered it "hard aport," just before collision. She might have swung ¼ of a point when I put my helm up.

Ques. You got no other order from the mate at any time?

Answ. No, sir; I did not. I looked at the compass from time to time; I had it right before my eyes. The Sunnyside is a first-rate steering vessel. I heard the lookout once before we struck; sung out "lights," and the mate went forward to look at it & came back, & after a minute looked at the other compass, which was aft the mainmast for the use of officers. I saw no lights myself. Our vessel was going about 8 or 9 knots an hour. She steers very steadily. I have been wheelsman on schr. Racene, bark Peshtigo, schr. Fillmore, barque Anne Wright, & schr. Skylark. The Sunnyside steers very well, as good as the
59 Pestigo. All the time I was at the wheel the wind was S. S. W.

Cross-examined:

I took the wheel at 2 o'clock a. m. The mate came on deck at 12 m., when the lookout reported light to mate; that was when mate first went forward. Then he came back again, and came to see if the vessel was steering all right on her course. I did not hear the lookout sing out a second time. Saw the mate go and look over to leeward. He did not go below at all, because I saw him all the time on deck all the time I was there. He was looking out to leeward. Don't know what else he was doing. After about 10 minutes he ran forward, and as he ran he sung out "hard aport," and I did so.

(Signed) his NICHOLAS + SMITH. mark.

Sworn & subscribed before me Feb. 23, 1870.

WM. D. WILKINS,
U. S. Comm. E. Dist. Mich.

Witness fees, 1 day, 284 miles, $29.90.

And the said GEORGE IRWING, being 52 years , & having been by me first carefully examined and cautioned, & duly sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, did depose & say as follows:

I am a ship-carpenter. Have worked at the trade 35 years. I raised the tug Goodnow from where she was sunk, in Lake Huron, about 33 miles above Ft. Gratiot, & about 7 miles out in Lake Huron. I raised her about 20 or 30 days after her collision with the Goodnow. She was sunk in about 82 feet water. We found her by a buoy her capt. had secured to the spot when she sunk. She headed out from land & a lee-e-tle down the lake, as she lay sunken. I saw the place of
60 contact. She was hit a very little forward of square. (Diagram of point of contract marked by witness hereto attached, marked "A," subject to objection of Goodnow's proctor.)

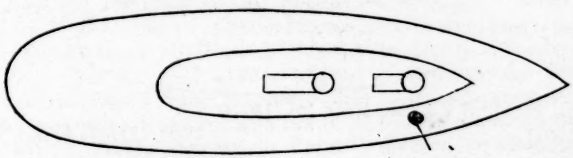


Exhibit A, marked by me.
(Signed) WM. D. WILKINS,
U. S. Comm.

Cross-examined:

Ques. In your judgment, how much would the keels of the two vessels have varied from a right angle as they came together?

Answ. The stern of the Sunnyside might have varied 50 or 60 feet from a right angle. Thinks she pried the after-part of the side of the hole out a little. I took no more particular notice of this hole than while we were getting her up and boarding it over to get her down to the dry dock. I noticed it at that time. If I had been called upon to observe at the time, I could have told you to an inch how it was.
(Signed) GEORGE IRVING.

Sworn & subscribed before me Feb. 23, 1870.
WM. D. WILKINS,
U. S. Comm. East. Dist. Michn.

Mms.—1 day, $1.50.

And the said GORDON CAMPBELL, being about 44 years old, & having ben by me first carefully examined & cautioned, & duly sworn to tesify the truth, the whole truth, & nothing but the truth in the abovematter of controversy, did thereupon depose & say as follows, to wit

I am a ship-carpenter and proprietor of a dry dock in Detroit, where vessels are repaired, and have been in such business for 14 years. I know the tug Goodnow, and had repaired her before. I made the repairs upn her rendered necessary by & consequent upon the collision betweether & the Sunnyside. She was taken to our dry dock for repairs 8 o ten days after she was raised. I think from the hole made in th Goodnow that the Sunnyside struck her forward of right
61 anles; maybe one or two degrees. She might have struck her fro a right angles up to two points forward of right angles. It was not aft of right angles; of that there can be no doubt.

Cro-examined:

I first sai one or two degrees; but it is some years since I sailed, and that would be making it two fine, as there are 360 degrees. I mean

from right angles up to two points. (Witness here draws the way in which the barque struck the tug, which is hereto attached and marked "Exhibit B,") and says she struck her either that way or at right angles.
(Signed) G. CAMPBELL.

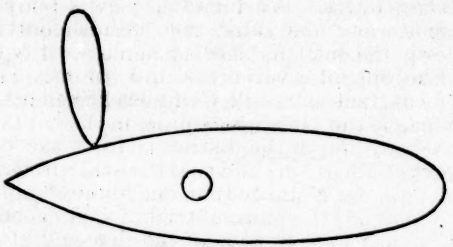


Exhibit B, marked by me, Feb. 23, 1870.
(Signed) WM. D. WILKINS,
Comm.

Sworn & subscribed before me on Febry. 23d, 1870.
WM. D. WILKINS,
U. S. Comm., E. Dist. of Michn.

MEMS.—1 day, $1.50.

And the said FRANCIS SHEPARD, being about 27 years old, and having been by me first carefully examined & cautioned & duly sworn to testify the truth, the whole truth, and nothing but the truth in the above matter of controversy, did depose & say as follows:

I live in Brockway, St. Clair Co. Have been a sailor 14 years. I was 2nd mate on the Sunnyside at the time of her collision with the tug Goodnow. I turned in that night about 1 o'clock a. m. I was on deck when we came out of St. Clair River. I was wakened from sleep by the shock of the collision. Had been sleeping with my pants, socks, & shirt on. When I waked I jumped up and ran right out on deck. I gave no orders. I found Cap. O'Neil on deck. I did nothing for some
62 few minutes. I then assisted in taking in studding-sails for the purpose of getting the tack clear of the Goodnow's smoke-sack, as it was reported. The tug sank in 12 or 15 minutes.

Cross-examined:

Capt. O'Neil was not in his shirt-sleeves. I was sleeping in the cabin.
(Signed) F. D. SHEPARD.

Sworn & subscribed before me March 1st, 1870.
WM. D. WILKINS
U. S. Comm., E. Dist. Michn.

MEMS.—Fees: 1 day, 80 miles, $9.50.

And the said , being about years old, & having been by me first carefully examined & cautioned & duly sworn to testify the truth, the truth, and nothing but the truth in the above matter of controversy, did depose, testify, and say as follows, to wit:

63 UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

I, William D. Wilkins, a commissioner duly appointed by the circuit court of the United States for the sixth circuit and east. district of Michigan, under and by virtue of the acts of Congress entitled "An act for

the more convenient taking of affidavits and bail in civil causes pending in the courts of the United States," passed February 20th, 1812; and the act of Congress entitled "An act in addition to an act entitled an act for the more convenient taking of affidavits and bail in civil causes pending in the courts of the United States," passed March 1st, 1817; and the act entitled "An act to establish the judicial courts of the United States," passed September 24th, 1789, do hereby certify that the reason for taking the foregoing depositions is, and the fact is, that the testimony of Bell, Fratus, Irving, Smith, Campbele, Shepard is material and necessary in the cause the title whereof is in the caption of said depositions named and pending in the district court of the United States for the eastern district of Michigan; and that the said witnesses, Bell, Fratus, & Smith lived at a greater distance than one hundred miles from Detroit, in the State of Michigan, the place of trial of said cause.

I further certify that a notification of the time and place of taking the said depositions signed by me was made out and served on the proctors for tug Goodnow, Mess. Newberry, Pond & Brown, to be present at the taking of the said depositions, and to put interrogations, if he or they might think fit.

64 I further certify that on the 23rd Febry., March 1st, 1870, & days thereafter named, in the year of our Lord one thousand eight hundred and seventy, I was attended by Alfred Russel, esqr., proctor for said barque Sunnyside; by H. B. Brown, esqr., proctor for said tug Goodnow, and by the witnesses aforesaid, who were of sound mind and of lawful age; and the witnesses being by me first carefully examined, and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, and their depositions being by me reduced to writing in the presence of the witnesses aforesaid, and from statements, and after carefully reading the same to the witnesses they each subscribed the same in my presence.

I have retained the said depositions in my possession for the purpose of delivering the same with my own hand to the court for which the same were taken; and I certify that the same will be retained by me until I shall deliver the same with my own hand to the clerk U. S. dist. court, E. dist. Mich., at Detroit, Michigan, the place where the said depositions were taken. And I do further certify that I am not of counsel nor attorney for either of the parties in the said depositions and caption named, nor in any way interested in the event of the cause named in the said caption.

In testimony whereof I have hereunto set my hand and seal this thirty-first day of March, in the year of our Lord one thousand eight hundred and seventy, and of the Independence of the United States of America the ninety-fourth.

[L. S.] WM. D. WILKINS,

United States Commissioner duly appointed by the Circuit Court of the United States for the Sixth Circuit and Eastern District of Michigan.

65 UNITED STATES OF AMERICA,
District of Michigan, ss:

I, W. D. Wilkins, clerk of the circuit court of the United States for the sixth circuit and eastern district of Michigan, do hereby certify that I am well acquainted with the handwriting of William D. Wilkins, whose name is subscribed to the annexed deposition, and that the signature to the same is in his proper handwriting. And I do further certify that he was at the time of signing the same a United States commissioner, duly appointed under and by virtue of the acts of Con-

gress in such behalf made and provided, by the circuit court of the United States of America for the sixth circuit and eastern district of Michigan.

In testimony whereof I have hereunto subscribed my name and affixed the seal of the said circuit court, at Detroit, in said E. district of Michigan, this twenty-first day of March, in the year of our Lord one thousand eight hundred and seventy.

[L. S.] WM. D. WILKINS, *Clerk.*

Costs taxable on above depositions: commissioner, $17.60; witnesses, 72.30—$89.90.

Received from U. S. commr. & filed on March 31st, 1870.

WM. D. WILKINS, *Dep. Clerk.*

66 In the district court of the United States for the eastern district of Michigan, *ss:* In admiralty.

JOHN MINER, OWNER OF TUG GOODNOW,
vs.
THE BARQUE SUNNYSIDE & HER BOATS, tackle, &c.

Deposition of John Miner & George Stomler, on behalf of the libellant in said suit, taken de bene esse at Detroit, Mich'n, on April 25th, 1870, before Wm. D. Wilkins, U. S. commissioner for said district, in the presence of H. B. Brown, esqre., libellant's proctor, & of Alfred Russell, esq're, claimant's proctor, said claim't's proctor consenting that said deposition may be taken, read, & used as evidence on the trial of said cause, and waiving all objection thereto on the ground of irregularity, informality, or insufficient notice; & saving & reserving all objection thereto on the ground of relevancy or competency.

And the said JOHN MINER, being about 39 years of age, & having been by me first carefully examined & cautioned, & duly sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, did thereupon depose and say as follows, viz:

I live in Detroit; am a sailor; have sailed over 20 years; 17 or 18 years as officer. Last season I commanded & owned the tug Goodnow. She is 130-odd feet long & about 20 feet beam. I remember her collision with the barque Sunnyside. Left Lexington that night about 10 o'clock.

Ques. What did you do when you left Lexington?

Answ. I went out right into the lake about 2 or 2½ miles, then stopped her engine & laid there un-moving until I turned it.

Ques. What time did you turn in?

67 Answ. We called the watch at 12 o'clock & turned in at probably 15 minutes after 12.

Ques. How was the weather when you turned in?

Answ. The wind was blowing quite fresh from the S. W.—a little cloudy; clouds running pretty fast. I should call it clear weather—a good night to see a light.

Ques. Who did you leave on deck?

Answ. The mate, Swartout, in charge of the deck.

Ques. Who else did you leave on deck?

Ans. The second engineer, Aaron Hagadon, who is a competent man, as far as I know. The fireman, Joseph Ayer, and the wheelsman, whose name I don't remember. The mate put Thomas Tobin on the lookout after I went below.

Ques. Did you leave a man on the lookout when you went below?

Ans. I did, but I do not recollect his name. I now think it was John Keegan.

Ques. What orders did you give to the mate when you turned in?

Ans. I told him to keep a good lookout, and if he saw any tug-boats come down with a tow to go to them, so as to know what tug it was, to take our turn. Then I turned in, and about 2 o'clock I woke up & spoke to the mate.

Ques. Did you go on deck?

Ans. I didn't go on deck, & don't recollect whether I got out of bed or not, but I spoke to the mate, & think I asked him how was the weather, & told him again to keep a good lookout, when I fell asleep again.

Ques. What awoke you?

Ans. The crash of the collision of the Sunnyside.

Ques. What did you do when you heard the crash?

68 Ans. When I first heard it I laid in my bed a moment, till the crash was all over; then I came up, and found the Sunnyside into us.

Ques. How far into you?

Ans. Cutwaters over our decks, & partly crowded around; her headgear was over the tug; all her sails were set, even to her studding sails. It appeared by the trimming of her canvass that she had the wind on her quarter.

Ques. How light was it when you got up?

Ans. Pretty light; it was break of day, should judge; we could see a vessel no less than a couple of miles distant; weather clear.

Q. How was the wind at that time?

Ans. The wind was about S. W., blowing a whole-sail breeze.

Ques. State what you know about the working of your engine & the ability to start her after she has been lying still.

Ans. I know that after she has been lying still for some time with steam up, she generally gathers water in her cylinder, & it is a hard matter to start her "fule jump;" by starting her on a fule jump she is liable to break down, as I generally hear from all her engineers.

Ques. How long after the collision did she sink?

Ans. In about 15 minutes.

Ques. What sort of a seaman was your mate?

Ans. I know only while he was with me I took him to be a good man, so far as I know.

Ques. Who was the lookout at the time of the collison?

Ans. The mate told me that after I had turned in he put Thomas Tobin as a lookout's man.

Ques. Where does Thomas Tobin live?

Ans. In Detroit.

Ques. State whether you have looked for him.

69 Ans. I have.

Ques. How many times have you been to find him?

Ans. Twice before to-day, and once some time ago; three times in all.

Ques. Have you ever been able to find him at home?

Ans. No, sir.

(Signed) JOHN MINER.

Sworn & subscribed before me, April 25th, 1870.

WM. D. WILKINS,

U. S. Comm'r, East. Dist. Mich'n.

And the said GEORGE STOMLER, being about 26 years old, and having been by me first carefully examined and cautioned, & duly sworn to testify the truth, the whole truth, and nothing but the truth in the above matter of controversy, did thereupon depose & say as follows, to wit:

I was employed on the Goodnow as 1st engineer. I turned in on night of collision at about ¼ past 12 p. m., (night.) The crash of the collision wakened me; it threw me out of my bunk. I ran on deck then to see what was the matter. I had left the 2d engineer, Aaron Hagabon, in charge of the engine. He is a competent man, so far as I know of. I also left Joseph Ayres as fireman. After our engine had been lying still for some time, I don't think it could have been started quick so as to have jumped her out of the way of that vessel safely in less than ten minutes. It takes that time to start her safely from the dock; she is the worst vessel to start that way I have ever been with. When I came on deck the wind was S. W., blowing quite fresh. It was light enough then, when I came up, to see a vessel without lights two
70 miles off. Her piston runs so close to her cylinder-head that the water condenses in the cylinder, & this is the reason it makes it difficult to start her quick.

(Signed) GEORGE STOMLER.

Sworn & subscribed before me on April 25th, 1870.

WM. D. WILKINS,
U. S. Comm'r, East. Dist. Mich.

71 UNITED STATES OF AMERICA,
Eastern District of Michigan, ss:

I, William D. Wilkins, a commissioner duly appointed by the circuit court of the United States for the sixth circuit and eastern district of Michigan, under and by virtue of the act of Congress entitled "An act for the more convenient taking of affidavits and bail in civil causes pending in the courts of the United States," passed February 20th, 1812; and the act of Congress entitled "An act in addition to an act entitled 'An act for the more convenient taking of affidavits and bail in causes pending in the courts of the United States," passed March 1st, 1817," and the act entitled "An act to establish the judicial courts of the United States," passed September 24, 1789, do hereby certify that the reason for taking the foregoing depositions is, and the fact is, that the testimony of John Miner and George Stomle is material and necessary in the cause, the title whereof is in the caption of said deposition named and pending in the district court of the United States for the eastern district of Michigan, and that the said witnesses lived at Detroit, in the State of Michigan, the place of trial of said cause, but were mariners and about to proceed on a voyage out of said district, and might not be present on the trial of said cause.

I further certify that a notification of the time and place of taking the said deposition, signed by me, was made out and served on the proctor for the claimant, Alfred Russel, to be present on the taking of the said depositions, and to put interrogatories, if he or they may think fit; and that said respondent's proctor consented that said depositions might be taken, read, & used as evidence in the trial of said cause, sub-
72 ject to the reservations expressed at the beginning of said depositions.

I further certify that, on the twenty-fifth day of April, in the year of our Lord one thousand eight hundred and seventy, I was attended by

Henry B. Brown, esqre., libellant's proctor, by Alfred Russel, esqre., respondent's proctor, and by the witnesses aforesaid, who were of sound mind and of lawful age; and the witnesses being by me first carefully examined, and cautioned, and sworn to testify the truth, the whole truth, and nothing but the truth, and their several depositions having been by me reduced to writing in the presence of the witnesses aforesaid and from their respective statements, and after carefully reading the same to the witnesses, they each subscribed the same in my presence.

I have retained the said depositions in my possession for the purpose of delivering the same with my own hand to the court for which the same were taken; and I certify that the same will be retained by me until I shall deliver the same with my own hand to the clerk of the U. S. district court aforesaid, at Detroit, Michigan, the place where the said depositions were taken; and I do further certify that I am not of counsel nor attorney for either of the parties in the said depositions and caption named, nor in any way interested in the event of the cause named in said caption.

In testimony whereof I have hereunto set my hand and seal this twenty-fifth day of April, in the year of our Lord one thousand eight hundred and seventy, and *and* the Independence of the United States of America the ninety-fourth.

(Signed) WM. D. WILKINS,
United States Commissioner, duly appointed by the Circuit Court of the United States for the Sixth Circuit and Eastern District of Michigan.

73 *Costs taxable on the above depositions.*

Commissioner:	Taking & certifying depositions to file 23 folios @ 20 c	$4 60
"	Oath to party, affidavit, proof of service, and to deposition, 4, @ 10 c	40
Comm'r		$5 00
Witnesses' fees, $3.00		$3 00
		$8 00

Received from Comm'r W. D. Wilkins this 27th, 1870, and filed.
D. J. DAVISON, *Clerk*,

United States district court, eastern district of Michigan. In admiralty.

JOHN MINER, OWNER OF TUG WM. GOODNOW,
vs.
BARQUE SUNNYSIDE.

And now comes Alfred Russel, esq'er, and withdraws his appearance as proctors for claimant.

(Signed) ALFRED RUSSEL.

Filed and entered May 2d, 1870.

D. J. DAVISON, *Clerk.*

74 *Marine protest.*

UNITED STATES OF AMERICA,
State of Michigan, Wayne County, ss:

[Stamp.]

To all people to whom these presents shall come or may concern:

I, Geo. W. Wolverton, a public notary in and for the State of Michi-

gan, by letters-patent under the great seal of the said State, duly commissioned and sworn, dwelling in the city of Detroit, send greeting:

Know ye that on the fifteenth day of June, in the year of our Lord one thousand eight hundred and sixty-nine, before me, the said notary, appeared John Miner, of the steam-tug called the Wm. Goodnow, of Detroit, burthen 273 tons, and noted in due form of law with me, the said notary, his protest for the use and purposes hereinafter mentioned; and now at this day, to wit, the day of the hereof, before me, the said notary, at the city of Detroit aforesaid, again comes the said John Miner and requires me to extend his protest, and together with the said John Miner also come John Kiggin, George Stomler, Aaron P. Hagadon, and Thomas Tobin, belonging to the aforesaid steam-tug, all of whom being by me duly sworn, voluntarily, freely, and solemnly do declare and depose as follows, that is to say: That on the thirteenth day of June, 1869, at 10 o'clock p. m., he, the said John Miner, set sail and departed in and with the said steam-tug, as master thereof, from the port
75 of Lexington, having on board the said steam-tug a cargo of, no cargo, and bound for the port of ; that the said steam-tug was then stout, staunch, and strong; had her cargo well and sufficiently stowed and secured; was well masted, manned, tackled, victualled, appareled, and appointed; and was in every respect fit for sea and the voyage she was about to undertake; and that the said steam-tug being engaged in towing vessels through the Detroit and St. Clair Rivers left the port of Lexington at the time above stated in search of a tow, and at 11½ o'clock p. m., when about two miles from the land, the engine was stopped, and the tug hove to with her head to the eastward, awaiting the arrival of a tow. At 3¼ o'clock a. m. of the 14th, while still lying to, with our head and stern bright lights and colored side-lights burning brightly, we saw the green lights of a number of vessels, bound up the lake, to the northward; all of them passing between the tug and the land, except one, which, when about one hundred rods distant from us, and bearing about two to three points off our starboard quarter, with her green light plain in sight, the wind being about S. W., *when* she suddenly kept off directly for us, and struck us on our starboard side, abreast of the pilot-house, crushing in the side of the tug, and causing her to sink in about fifteen minutes.

At the time of the collision the weather was clear, and day beginning to break, so that a vessel bearing to the northward or eastward could be plainly seen one mile distant.

76 The tug remained alongside the vessel until she sunk; all hands getting on board the vessel, which proved to be the barque Sunnyside, of Detroit. After remaining on board the Sunnyside about one hour, we were taken off by the tug John Martin, and landed at Port Huron; and the said John Miner further says that as all the damage and injury which already has or may hereafter appear to have happened or occurred to the said steam-tug, or her said cargo, has been occasioned solely by the circumstances hereinbefore stated, and cannot, nor ought to be, attributed to any insufficiency of the said steam-tug, or default of him, this deponent, his officers or crew,

He now requires of me, the said notary, to make this protest, and this public act thereof, that the same may serve and be of full force and value as of right shall appertain. And thereupon the said John Miner doth protest, and I, the said notary, at his special instance and request, do by these presents publicly and solemnly protest against winds, weather, and seas, and the loss and damage occasioned by the collision and

sinking aforesaid, and against all and every accident, matter, and thing had and met with as aforesaid, whereby, or by means whereof the said steam-tug or her cargo already has or hereafter shall appear to have suffered or sustained damage or injury, for all losses, costs, charges, expenses, damages, and injury which the said steam-tug, or the owner or owners of the said steam-tug, or the owners, freighters, or shippers of her said cargo, or any other person or persons interested or concerned in either already have, or may hereafter pay, sustain, incur, or be put
77 into, by or on account of the premises, or for which the insurer or insurers of the said steam-tug, or her cargo is or are respectively liable to pay or make contribution or average according to custom, or their respective contracts or obligations; and that no part of such losses and expenses already incurred, or hereafter to be incurred, do fall on him, the said John Miner, his officers or crew.

Thus done and protested in the city of Detroit this fifteenth day of June, in the year of our Lord one thousand eight hundred and sixty-nine.

In testimony whereof I, the said notary, have subscribed these presents, and have also caused my seal of office to be hereunto affixed the day and year last above written.

[L. S.] (Signed) GEO. W. WOLVERTON,
Notary Public.

STATE OF MICHIGAN, *Wayne County, ss:*

D. Swartout, John Kiggin, George Stomler, Aaron P. Hagadon, Thomas Tobin, seamen of and belonging to the steam-tug called the Wm. Goodnow, being severally sworn, do severally make oath and say that the foregoing instrument of protest hath been clearly read over to them, these deponents, and that the several matters and things
78 therein contained are right and true in all respects as the same are therein particularly alleged, declared, and set forth.

JOHN MINER,
Mate.
D. SWARTOUT,
2d Mate, Algonac.
JOHN KIGGIN,
Master deck.
GEORGE STOMLER,
1st Eng., Algonac.
AARON P. HAGADON,
Dep. 2d Eng., Algonac.
THOMAS + TOBIN,
Lookout.

Subscribed and sworn to before me this fifteenth day of June, 1869.
(Signed) GEO. W. WOLVERTON.

I hereby certify the foregoing to be a true and correct copy of the original now on file in my office in the city of Detroit.
(Signed) GEO. W. WOLVERTON.

79 At a session of the district court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district-court room in Detroit on Wednesday, the

fifth day of April, in the year of our Lord one thousand eight hundred and seventy-one.

Present, the honorable John W. Longyear, district judge.

JOHN S. MINER
vs.
BARQUE SUNNYSIDE,
AND
H. NORTON STRONG
vs.
TUG WM. GOODNOW.
} On libel and cross-libel for collision. In admiralty.

These causes having been heretofore heard together and submitted to the court for judgment, and the court having taken time to consider of its decree therein, and having maturely weighed the pleadings and proofs and the arguments of counsel submitted therein, and due deliberation being had, it is now by the court ordered, adjudged, and decreed that the said barque and said tug were equally in fault in bringing about said collision, and that the loss and damages accruing to said barque and to said tug, respectively, be, and the same hereby are, apportioned between said barque and said tug in equal moiet'es; and for the purpose of ascertaining the damages sustained by said barque and said tug respectively, it is hereby referred to the clerk of this court as a commissioner to take proofs respecting said damages, and to ascertain and report the amount thereof, together with such proofs, to this court with all convenient speed. Costs to abide the further order of the court.

80,81 [L. S.] *Testimony on behalf of the Sunnyside.*

The district court of the United States for the eastern district of Michigan. In admiralty.

JOHN MINER
vs.
THE BARQUE SUNNYSIDE.

The deposition of John R. Gillet, taken before me, Henry B. Brown, notary public within and for the county of Wayne, on the 3rd April, A. D. 1872, to be read in evidence on the part of the claimant in the above-entitled cause.

And the said JOHN R. GILLET, of lawful age, being by me first duly examined, cautioned, and sworn, said, in answer to the following questions, as follows:

How long have you been engaged in vessel-business in Detroit?

I do not know. Since the year one thousand eight hundred and forty-eight, more or less—during the most part of that time.

You were engaged in the business during the year 1869?

Yes, sir.

Do you know the tug Goodnow?

Yes.

Do you know the barque Sunnyside?

Yes, sir.

Were you one of the members of the Tug Association?

82 Yes, sir.

That association embraced all the tugs at this port, did it not?
All of any size or importance.
Including the tug Goodnow?
Yes, sir.
The association had tugs laid up during the season, did it not?
Yes, sir.
How many tugs, on an average, were laid up during that season?
On an average I should not think over two.
Was there sometimes a greater number?
I think there were—out of commission.
Were you acquainted with the business and earnings of the association during that season?
Yes, sir; to a certain extent—as far as their reports were made, that is all.
How did the business of the association during the months of July and August compare with the previous months of the year?
They were less than June considerably—the earnings were.
Do you know what was the difference between the month of August and the month ending 31st May?
About $10,000.00.
(By Mr. H. B. Brown.) In the earnings of how many tugs?
Of the entire number of tugs, which was about forty.
How did the earnings of the month of September compare with the month ending May?
83 About $12,000.00 less than May.
How the month of August with the month of May?
$10,000.00 less.
With June?
Between $3,000 $4,000 less than June.
Do you know what the dividends paid by the association to the different tugs?
About 31 per cent. for that season upon the valuation fixed by the association.
Out of that what expenses were the owners to pay?
The owners paid the master, the first engineer, bills of supplies, (except fuel,) and certain portion of repairs—what are called ordinary repairs.
(Question objected to, and articles of association should be produced.)
About what percentage on the valuation placed on the vessels by the association would the wages to be paid by the owners amount to?
From 8 to 10 per cent.
What percentage upon that valuation would the supplies which the owners were to furnish amount to?
Not far from 6 or 7 per cent.
You were interested in that tug?
In the tug Stranger; yes, I was.
After deducting the wages, supplies, and repairs which the owners were to furnish, what per cent. did the tug Stranger earn?
The actual net percentage was about eleven.
For the entire season?
84 Yes.
Were the wages paid to the captain and engineer of the Stranger more or less than were usually paid?
Less, sir, considerably, than the average.
Cross-examined:
How much less?

The difference between the amount we paid and the highest price is $14.25 for the season. It is pretty hard to get at the average price.

Was the Stranger a first or second class tug?

A second-class tug.

What was the Stranger valued at by the association?

$17,000.

What was the valuation of the Goodnow?

I do not know.

Not more than 2 or 3 times as much as the Stranger was?

No; very little more than the Stranger.

Do you mean to say that 11 per cent. represents the average net profits of the tugs belonging to the association for that year?

I should think that would be about the average—in some cases less.

Re-examined:

What books were kept by the different tugs of the association; did each tug keep separate accounts?

There was a separate account kept for each tug by the association.

Did each tug have its own individual books?

Yes, sir; there was a wood-book and a draft-book kept on each tug besides.

What accounts were entered on those books?

85 The earnings and expenses for fuel.

And supplies?

No, sir.

Were the tugs which were kept laid up by the association so situated, or in such a condition, that they could take the place of those on commission in case of disaster to any of them?

Yes, sir.

(Signed) JOHN R. GILLET.

Subscribed and sworn to before me this 6th day of April, A. D. 1872.

HENRY B. BROWN,
Notary Public.

Commission fees: Record, 900 words, 1.80; swearing witness, 10—1.90.

It is admitted in this cause that the damage done to the barque Sunnyside on account of collision with the tug Goodnow was the sum of two hundred dollars and cost, that sum to make good and repair such damage. It is also agreed that the annexed copy of the articles of the Detroit & St. Clair River Towing Association may be read in evidence with the same effect as if the original thereof were produced. Also, that the foregoing deposition may be read in evidence, subject only to objection for irrelevancy and incompetency.

(Signed) NEWB., POND & BROWN.

86 We, the undersigned owners of tow-boats, do hereby form ourselves into a society to be called The Detroit and St. Clair River Towing Association.

1. And hereby mutually promise and agree irrevocably to be bound by these articles and by-laws hereto attached, or which may be hereafter adopted as herein provided.

2. The general objects & purposes of such association are as follows: To supervise, direct, and manage the boats owned by the members of

this association in every respect. To determine rate of wages, except the captain and first engineer, who shall be hired and paid by the owners. To receive the gross earnings. To pay all expenses and damages as may hereafter be provide' by said articles or by-laws, and divide the profits.

3. The president or secretary, or either of them, under the direction of the directors, are hereby authorized to collect and receive all the moneys due from the earnings of the said boats or otherwise, and for that purpose may use any of the names of the members. The tug-boats shall be and continue the separate and individual property of each of the members as if these articles were not entered into.

4. The association shall endure until the first day of January, 1870, from and after the first day of March, 1869. The officers shall consist of a president, vice-president, secretary, and treasurer, to be elected at the first meeting of the association.

5. That every owner or managing owner subscribing these arti-
87 cles shall have one vote on every one thousand dollars ($1,000) stock in this association.

6. The board of directors shall have the entire control and direction of the running or laying up of the boats. The rates of towing and other services. The rate of wages, except captain and first engineer. The purchasing of wood. And shall have all power and authority for the full and complete transaction of all the business of the association. The paying, settling, or compromising of all claims against the said boats and said association.

7. Every member of the association shall appraise each tug belonging to the association. The amount of each appraisal shall be added together and divided by the number of appraises, and the quotient to be the appraised value of such tug in the association. If the owner's valuation is above the average valuation, his valuation shall be reduced to that valuation. If the owner or owners of any boat or boats shall feel ag'rieved by the appraisal of the association, he or they may appeal therefrom to the board, and if said board shall be of opinion, taking all circumstances into account, that such valuation should be changed, they may do so, by a majority vote, after July 1st, 1869.

8. Upon signing these articles, each member shall place opposite his name the name of the boat or boats he proposes to enter in the business of said association, and thereby agree to hold the same in all respects
subject to the control of the board of directors, and in all respects
88 to comply with the orders of the board of directors and with the obligations imposed upon them by these articles and the said by-laws, and further agrees that in case he does not do so, the said president or secretary, under the direction of a majority of said board, shall be entitled to have and take full and complete possession of any or all the tugs of said member, and manage and control them until the end of the season for the benefit of said association.

9. At the commencement of the season of navigation, or when first directed by the board of directors to be put in commission, each member shall put such tug in good order & repair to the satisfaction of the board of directors and at the expense of the owner.

10. The directors shall, out of the gross earnings, pay—

First. All the running expenses of the boats except captain & first engineer & supplies.

Second. All the expenses of the association necessary to enable them to carry on the business.

Third. They may retain in their hands an amount of the monthly earnings to pay all outstanding claims and repairs, as hereinafter designated, for all actual damages while in the services of the association, natural t'are & wear excepted, or for loss or damage done by said tugs while employed in the business of the association, or under their control: Provided, however, that in all cases where the association is *is* bound to repair and the owner of the tug is entitled to receive any
89 moneys from insurance companies, or other parties, such monies shall be collected and paid over to the secretary & treasurer of the association, and the said secretary & treasurer are hereby authorized & empowered to bring suit therefor in the name of the proper person, & settle & compromise the same. And in all cases where said association receive any moneys, as above provided, from any insurance company, said association shall refund to the insured the amount of the premium on such insurance.

Fourth. After payment and retaining of the above sums, the said board shall also retain enough for current unpaid expenses, and between the first & fifth of every month divide the profits arising therefrom among the members pro rate according to the amounts as returned by the committee of appraisers.

Fifth. After the close of the season's business the board shall, as soon as possible, close up the business of the association & divide pro-rate any moneys remaining in their hands.

11. In case any tug shall be lost or destroyed, such tug and its appraised value shall be stricken from the list and the books of the association, and from such time the owner or owners of said tug shall not be entitled to any share or dividend from such association on account of such tug, or in case of sale it shall be made subject to this agreement.

90 12. And in case any member of this association shall die, his death shall not cause a dissolution of this association or effect its business in any way, but the share and interest of such deceased person may be represented in this association by the parties entitled thereto.

13. Nothing contained in these articles or by-laws shall be construed so as to create a partnership or joint interest among the members in regard to anything whatsoever; and where money or property is realized by said association each member shall be entitled in severalty to his own share, proportion, according to the appraisal heretofore referred to. The association, as such, or its funds, shall not be liable for any acts or doings of any of the individual members.

14. Any person owning a boat or boats may be admitted upon such terms & apprais'ment as the board may see fit, and any member may enter other boat or boats upon such terms or apprais'ment as the board shall see fit.

15. In case any difficulty or dispute shall arise respecting any matters connected with the business of this association between the said association or its officers, or agents on the one part and any individual member on the other part, or between any of the members, the same shall be referred to three arbitrators, to be selected in the usual manner, and the decision of two of such arbitrators shall be binding upon the association & its members.

16. The board of directors shall have power to charter or hire any other tow boat or boats & to run the same or lay them up as they shall deem best.

91 17. That the association will be liable for and pay for one-half part of the underwriters' valuation in case of loss, and in the event of the owners of said boat having insurance on such boat they shall be

bound to pay or assign over all excess of insurance over the underwriters' valuation to the Tug Association.

(Signed.) MERRICK LAWLESS ESSELTYNE, *Tug Samson.*
CAMPBELL, OWEN & CO., " *Champion.*
THOMAS ADAMS, " *Vulcan.*
J. STRACHAN, " *W. B. Castle.*
TROWBRIDGE, WILCOX & CO., *Tug McClellan, B. B. Jones, New Tug.*
C. H. CAREY, *Tug Hector.*
S. B. GRUMIMAND, " *Dispatch, Eclipse.*
DANIEL MIERSEL, " *G. P. Clark.*
H. E. MCGRAW, " *Tawas.*
M. B. KEAN,
Agent for Tug Iron City, May Flower, Geo. N. Brady, M. J. Mills.
WILLIAM LIVINGSTON, *for Tug Gen. Burnside, John Martin.*
D. G. MCALPINE, *Tug Parks.*
THOMAS MURPHY, " *Stranger.*
A. B. CRAWFORD, " *Jno. Prendervill.*
R. I. HACKETT, " *Constitution.*
" " " *Jouave.*

92 DEMOSE, *Tug U. S. Grant, Bob Anderson, L. S. Lyon.*
JOHN MINER, *Tug Wm. Goodnow.*
THOMAS MCGREGOR, " *Dart.*
GEO. H. PARKER, " *Geo. H. Parker.*
N. C. & W. J. WESLAW, " *Kate Williams.*
JAMES M. BALLENTINE, " *Weslaw.*
" " " *W. A. Moore.*
THOMAS MURPHY, " *Balize.*
THOMAS WILSON, " *Red Erick.*
" " *Tug New Tug, Geo. E. Brockway.*
GEO. E. BROCKWAY, *Tug Kate Moffat.*
H. N. STRONG, " *Sweepstakes.*
" " " *Satillite.*
" " " *I. N. Masters.*

Testimony on behalf of the Goodnow.

And the said JAMES M. BALLENTINE, having been by me first carefully examined and cautioned, & duly sworn to testify the truth, the whole truth, and nothing but the truth in the above matter of reference, did depose and say as follows, viz:

I live in Detroit; am a member of the firm of J. M. Ballentine
93 & Co.; I contracted to raise the tug Goodnow and to deliver her at the dry-dock in Detroit in 1869. The Tug Association were to give me the use of the tug Parks in such raising. Afterwards, and at the time of raising the Goodnow I had to employ some other tugs belonging to the association, and on my showing them that I had lost money by the job of raising her, they donated me the services of their other boats. As near as I can remember, we had the services of the T. F. Parks from nine to ten days; I had the Sweepstakes for five or six hours in the day-time. The Sweepstakes at that time, and for a job of that kind, was worth $25 or $30 an hour. I had the tug Bob Anderson about two days. We manned the steamer Park and paid her expenses. The association manned the other boats.

Question. What could the tug Goodnow be chartered for per day over and above expenses, based upon the rates you were then charging for the use of tugs?

Answer. I think her services were worth about one hundred dollars ($100) a day over and above her expenses.

Recalled on February 19th, '72. Examined by Mr. Canfield:

(To Camfield.) Ques. For what length of time do you consider the services of the Goodnow to be worth $100 per day?

Answer. From the time she was sunk by the collision until the time she was repaired and put in serviceable condition again. I consider her services would be worth $100 a day for each consecutive day for any number of days during the season of navigation. Tugs gen-
94 erally work right along every day, Sundays and week-days, during the season of navigation. I base my opinion upon what tugs were earning at that time, and the rates charged for tugs of that class, having two tugs of my own at that time, of similar size, and knowing what they were doing. I know of three tugs belonging to the association that were paid $100 a day, net, that season. Also one of our tugs, the Winslow, earned nearly $100 a day, net, that season during the season through; but all tugs, owing to delays & detention and break-downs, did not average that sum, net, during that season. The Winslow is a larger and more powerful tug than the Goodnow. I cannot call to mind so as to name any tug of the size and capacity of the Goodnow that earned $100 a day, net, during the time the Goodnow was laid up by the collision. The Winslow is a good deal larger than the Goodnow. The tugs I have named as earning $100 a day were three tugs which were chartered for the entire season by the tug association. They were hired by the association in order to prevent competition with their boats during the time the Goodnow was laid up; and had the collision not occurred she would have been laid up once in every three weeks for two days at a time, to clean boilers. I cannot state definitely how many days she might have been laid up in addition had the collision not occurred. I do not think there was any tug under charter for the continuous time the Goodnow was laid up. There were tugs chartered all of this time, every day, but only for jobs, for a few days at a time. I desire to say that the only way I
95 arrived at the Goodnow net value was from what we were hiring our tugs for, and from what we were chartering other tugs for raft-towing and for wrecking. I am under the impression that the net dividend on the value of the tug association's boats was 31 per cent. I cannot tell what deduction was made on the Goodnow's dividend on account of her being laid up. I went up to the Goodnow to raise her about 10 days or 2 weeks after she was sunk. There was no time lost. A wrecking company made proposals to raise her; so the boat was buoyed, and then the wrecking company (the Coast Wrecking Co., with all modern appliances) asked $5,000 for raising her, and I opposed it in the association, and said it was not worth half the money; so they took me at my word, and made me take it for half; and when I got through I wished I had left the wrecking company take it. She was sunken in 82 feet water, and it was one of the most difficult wrecking jobs ever done on the lakes. Don't remember the day we got her down to the dry-dock. It was about eight days from the time we left here in the Parks to go to the wreck, and the Park was here two days before starting, getting her materials and timbers for raising.

(Signed) JAMES M. BALLENTINE.

Sworn and subscribed before me on Feb. 19th, 1872.

WM. D. WILKINS,
U. S. Commissioner, E. Dist. of Mich'n.

96 Brown for Miner; Canfield for Sunnyside.

And the said WM. LIVINGSTON, jr., having been by me first carefully examined and cautioned, & duly sworn to testify the truth, the whole truth, and nothing but the truth in the matter of controversy aforesaid, did thereupon depose & say as follows:

I was treasurer of the Detroit and Lake St. Clair Tug Association during the year 1869. I remember the sinking of the tug Goodnow in 1869. A contract was made with J. M. Ballentine to raise her for $2,500, and deliver her at a dock in Detroit, with the understanding that he was to have the use of the tug T. F. Park, without charge or expense, and also that he was to have the use incidentally of any of the other tugs of the association which he might require, without charge or expense. He went on raised her. He received $2,507.50. He had the use of the T. F. Park about nine (9) days. I cannot give the exact time. Also the use of the tug Sweepstakes for about ten or twelve hours—at least that was the time the capt. handed in with his trip-sheet, & wanted me to give him credit thereupon for $150, which I showed him we could not do, as we got nothing for it. Also the assistance of the tug Bob Anderson; can't tell for how long a time. That is all the assistance I know of. The T. F. Park was worth $200 a day for wrecking purposes; that was our tariff under the association. We charged Ballentine nothing for the boat, but he manned her himself and paid all her expenses himself.

97 Her worth per day (Ballentine paying expenses) would be $100 a day, the way the association were then charging. Our charges for the Sweepstakes, when working by the hour, were $30 for the first hour & $25 for each successive hour. The tariff of the association would have been the same for the Anderson, but she was not worth so much as the Sweepstakes. The Sweepstakes is worth about $50 a day more than the Anderson. When Ballentine delivered her here, at Campbell and Owen's dry-dock, the dock was full, and we couldn't get her in for some time, and we settled with Capt. Miner by paying him $2,500, and paying the incidental bills connected with her, being $101, including use of steam-pumps on her, (think there were two of them,) and the engineers and helpers employed around them.

I can't state now how many days the Goodnow was out of commission.

Ques. What could the Goodnow be chartered for per day, over and above expenses, based upon the rates you then were charging for the use of tugs?

Ans. About one hundred dollars.

Cross-examined:

The incidental bills we paid were paid because the dock was full and we could not get her in, and Ballantine claimed that his responsibility was at an end when he brought the vessel to the dry dock. The board of directors of the Detroit and St. Clair River Towing Association made the bargain with Ballantine. The Park, Sweepstakes, and Anderson (& any other help he might have had that I know nothing about) were

98 furnished by that association. The three tugs and incidental help was furnished to Ballantine without charge on the part of the association. That was part and parcel of the contract. Miner was not a party to the contract in any other way than as a stockholder in the association, a joint-stock company. I have no personal knowledge of the length of time the Sweepstakes & Anderson were employed, and only know when the Park left and when she returned back here. All I know of the services rendered by these tugs is from what was reported to me.

These services were in July, 1869. I make the statement as to what the Goodnow was worth on the basis of what the association charged on the irregular tariff of prices for such vessels. Business was fair at the time the Goodnow was out of service. Some of the tugs were laid up, which made a more brisk demand for the others. Some of those running were more sought after than others, but the Goodnow was not one of those so sought after; she was a good tug of her class.

The $2,500 was paid Miner to re-imburse him for all his damages to his boat. He drew his dividend as a member of the association all the time the boat was laid up. J. M. Ballantine was a member of the tug association.

Redirect exami.:

Under our association contract the association were either bound to raise and repair the tug when sunk, or to let her lie and pay for one-half of her value.

(Signed) W. LIVINGSTON, JR.

Sworn and subscribed before me on Jan'y 3d, 1872.

WM. D. WILKINS,
U. S. Commr.

99 And said JOHN MINER being by me first carefully examined & cautioned & duly sworn to testify the truth, the whole truth, and nothing but the truth in the above matter of controversy, did thereup' depose, testify, & say as follows, to wit:

Live in Detroit; was owner of tug Wm. Goodnow at time of her sinking by barque Sunnyside. I have paid the following bills for the repairs of the Wm. Goodnow, caused by said collision:

1. Desutell & Hutton, repairs to iron-work, boilers, &c.....	$345 45
2. Campbell & Owen, repairs to hull & dry-dock bill.....	1,142 41
There is $100 subtracted from bill for extra work after she was got off dry-dock. I employed carpenters for 18 days to finish her, the bill for this being.....	54 00
3. Flattery & Bro.'s bill of furniture, $66.00, of which $21 is extra, leaving a balance of.....	45 00
4. William McMillan & Co., for hardware, repairs, & supplies, $173.41, of which $30 is extra, leaving.....	143 31
5. Peterson's bill of joiners' work, $525.00, of which $95 is extra, leaving a balance of.....	530 00
6. Campbell & Owen's bill for work on stern-post, shue, rudder, &c.....	81 44
7. Desutell & Hutton, iron & hardware, labor, &c., on repairs, stricken out by consent of libellant in cross-examination.	
8. Dry-Dock Iron-Works, repairs on rudder, stern-post, & shoe.....	36 70
9. Wm. Wright & Co., for repairs in glazing on boat, $16.96; from which deduct $4 for extras, leaving balance of....	12 96
10. Dry-Dock Iron-Works, for blacksmithing, repair, $194.85, less $36.70 for bill previously rendered, leaving balance of.....	158 15
100 11. Guy F. Hinchman & Co., for ship-chandlery furnished in repairs.....	48 19
12. Guy F. Hinchman & Co., for provisions, ship-chandlery, and supplies furnished.....	125 29

13. James Flower & Bros., for bell, whistle, pipe, &c., furnished, $88.45, deducting for extras $36, leaving balance of 52 45
14.
15. Campbell, Owen & Co., caulking & oakum 1 65
16. Same, for carpenter's work, and material not put in.

Carried over	2,777 00
Brought over	2,777 00
17. John Oades, bill for deck-plank furnished	35 43
18. Charles Julenville, bill of painting, $197.00, from which deduct $20 for extras, leaving	177 00
19. Joseph Klein, for boarding men while boat was under repairs	49 00
I had an engineer on the Goodnow who worked about 5 weeks while the boat was being repaired; his wages were over ..	150 00
I also had a second engineer at work part of said time; his wages while so employed amounted to	21 00
I was engaged myself at work in helping raise and in repairing the vessel; my board I call $15 a month, & services $100 a month; I charge from time she was sunk until she was got out and running, three months	345 00
101 There was paid for paint, oil, & oakum, for which I have no voucher, the sum of	30 00
I also paid for lumber	1 30
And for clothes-hooks & screws	1 70
And also for draying	2 00
And paid for tacks & nails	2 00
I paid for cleaning cabin & dishes after she was sunk	11 00
I paid for labor incidental to repairing vessel	12 00
And I paid for recovering my steering-wheel	8 00
I paid for board of the men aboard the Huron coming down.	12 00
I paid for new skate, gilt balls, & figure-head lost by collision.	45 00
And paid for a clock, to replace one lost	12 00
20. A bill of Campbells & Owen's for repairs, $216.89, less amount already included in voucher 6, $81.44, leaving balance of	135 45
(Desutell & Hutton's for iron work & repairs has been already put in.)	
Total	3,826 88

Ques. What was the value of the services of the Goodnow per month, or per day, after deducting expenses?

Ans. If I was to charter her for a month through the months of June, July, and August, the charterer paying all expenses, it would $4,500 average about fifteen hundred dollars a month. I would call this her average monthly earnings during the season. This I put pretty low.

102 Cross-examined:

Voucher No. 1 includes all the items furnished by Desotell & Hutton to the Goodnow, and voucher No. 7 should therefore be withdrawn. Can't recollect whether I paid any bills to Campbell & Owen which they did not receipt. I think I got receipts for all my payments; one Hinchman did for me, as he paid most of my bills himself. Some-

times I got Campbell & Owen to draw off a part of their account against me upon a separate statement. Cannot state which of the bills presented were paid by myself and which were paid by Hinchman. Think the collision took place on June 13th.

Ques. Whether item of provisions charged June 11th, '69, were furnished before the collision?

Ans. I cannot recollect whether they were or not. The Goodnow remained sunk about 27 days before she was raised. They were five or six days making preparations to raise her before they commenced raising her. I went up with Ballentine to raise her; we were absent from the time we left here till we got back with the tug, 8 or 9 days. It was a week or ten days after she was sunk before they commenced looking around for any one to raise her. Cannot give the entire amount I paid out to fit up and repair the tug after she was sunk. I can only refer to the bills I have put in, which I never footed up. I know it has cost me more than the $2,500 which the association agreed to pay me. Cannot tell, but can only guess, how much I paid out for betterments to make the tug better than she was when she was sunk. After the col-
103 lision some part of the boat was examined to see what it would cost to repair her. They went there of course to see, but they never told me what it would cost. After they had been there, & after they had held two or three meetings they offered me the $2,500. I went right off to cruising whenever the repairs of the tug was repaired. Cannot tell how long she was in dry-dock, nor how long she was undergoing repairs. There was delay in repairing the tug; I cannot say for what reason it was; after they commenced repairing her things went on pretty rapidly. Cannot give the date when the repairs were ended. I have personal knowledge as to the correctness of the bills presented, I believe; know it as well as if I had bought & paid for a coat. I may have been cheated or overcharged of course, as every one is liable to be, but I gave just as much attention as I ever did to anything else.

Ques. How did the tugging business in June & July, 1869, compared with the other periods or months of the same year? How was it as to this tug?

Ans. Those two months were a little duller than the average of other months; I cannot say how much duller. My tug might have made more than $1,500 a month and might have made less during the time she was laid up. It is chances. Cannot tell how much the tug earned from the first of June until time of collision, nor can I tell without reference to the books how much she earned in May, nor can I tell without reference how much she earned in any one month of the season of 1869. Don't recollect whether any tug was chartered continuously for the space of time the tug was laid up after the collision, or
105 the month preceding the collision; the Goodnow was actually employed in earning money about four days out of every five. She was idle about $\frac{1}{5}$ of the time. Had no collision occurred and I had been running during the time I was laid up, I might probably have lost a day or a day and a half out of every five.

Ques. At the time you were paid the $2,500 for repairing the tug did you not transfer to the Tug Association all claim for damages against the Sunnyside?

Ans. There was no doubt it would be divided amongst them. I took what they would give me, would recover the balance.

Ques. Have you any interest whatever in the damages sought to *to* be recovered against the Sunnyside?

Answ. I have a claim. Yes.

Ques. Have you taken any part yourself in employing counsel or otherwise in prosecuting this claim against the Sunnyside?

Answ. I have made no expense as yet. The Tug Association have taken it up and are prosecuting it for their own benefit. At the time I took the $2,500 I cannot recollect whether I signed some papers or not. There were some papers they wanted me to sign, but I did not sign them. Can't remember whether I agreed to sign them or not.

(Signed) JOHN MINER.

Sworn & subscribed before me Jan. 4th, 1872.

WM. D. WILKINS,
U. S. Commiss'r, E. Dist. Mich.

John Miner recalled by Mr. Brown:

Both H. N. Strong and myself were members of the Tug Association at the time of the collision. It wasn't agreed upon that the Tug
106 Association should give me the amount they should collect from the Sunnyside over and above the $2,500 they had paid me for repairs.

(Signed) JOHN MINER.

Sworn and subscribed before me Feb. 1st, 1872.

[SEAL.] WM. D. WILKINS,
U. S. E. Dist. Mich.

John Miner recalled & examined by Mr. Brown:

The Goodnow finished her repairs, I think, on the 30th of September. I commenced raising her nearly three weeks after she sunk. There was a delay of nearly a month after she got to Detroit before she commenced repairing. Her wheel and rudder were injured. I suppose they were broken while towing before she got into the rapids. The water was just about on top of her decks while we were towing her in, and I suppose, being so deep sunk, she fetched up on the rocks or beach as we towed her. The work done on the stern-post and shoe was in consequence of the injury received at that time, or it might have been occasioned when she sank stern first.

Cross-examined:

Ques. After the boat was brought to Detroit was there not some talk among the officers of the association about laying her up for the balance of the season? (Taken subject to objection.)

Ans. I don't know but there was, but they concluded to fix her up and start her out again. As near as I know it was about a month after she got to Detroit before they commenced repairing her.

Ques. Did not the repairs on the tug commence as soon as the officers of the association concluded to repair her and not lay her up?

107 Ans. They were looking for who'd take the contract the cheapest, and as soon as I found out I commenced repairs. I don't recollect whether it was as soon as the association concluded or not. I don't remember when the association concluded not to lay her up. I did not look round to see who would take the job of repairs; they had a committee in the association to attend to that. I heard talk that the committee were looking around to see who had best take the job; don't know this of my own knowledge.

(Signed) JOHN MINER.

Sworn & subscribed before me March 16th, 1872.

WM. D. WILKINS,
U. S. Commr. East. Dist. Mich.

179 ATWATER STREET,
Detroit, Nov'r 1st, 1869.

Tug Wm. Goodnow to Desotele & Hutton, boiler-makers, Dr.

Sept. 18.	To 332 lbs. iron for wheel } 344, 10	34 40		
	" 12 " rivets " " }			
	" 5 " stay-bolts, 18	90		
	" 25 " coal	25		
	" $\frac{1}{10}$ day for forge on iron	70		
	" $10\frac{6}{10}$ " time on wheel, 26s	34 45		
	" 1 " " boy, 13s	1 62		
				72 32
	" 50 lbs. rivets for rudder, 10	5		
	" $18\frac{8}{10}$ ds. time on do. 26s	35 10		
	" 20 lbs. coal	20		
				40 30
	" 1 smoke pipe 48×28, 1,980, 10	198		
	" 2 ds. fitting, 26s	6 50		
				204 50
	" $\frac{2}{10}$ " forge rep. chains, 70	1 40		
	" $3\frac{8}{10}$ " cutting rudder, 26s	12 35		
				13 75
30.	" 19 lbs. iron for brace for ex. pipe, 10	1 90		
	" $\frac{1}{2}$ day forging, 71	3 50		
	" 4 bolts & nuts, 12	48		
	" 1 day fitting	3 25		
				9 13
	" $\frac{6}{10}$ " on pipe for pony eng., 26s	1 95		
	" $\frac{1}{10}$ " forge on door, 71	70		
	" 15 lbs. iron, 10	1 50		
	" $\frac{4}{10}$ ds. time, 26s	1 30		
				5 45
				$345 45

Rec'd pay't.

DESOTELE & HUTTON.
O K.

[Stamp, 2 cents.]

No. 1.

109 (2) Folio 3 & 6. DETROIT, MICHIGAN, *September*, 1869.

Tug Goodnow to Campbell, Owen & Co., Dr.

[Ship-builders, repairers, joiners, dealers in all kinds of ship & other timber. Office cor. Atwater & Dequendee streets.]

Aug. 12.	42 pine		84
13.	1 dockage		60 00
	$\frac{3}{4}$ day team		3 75
14.	140 lbs. iron, 8.40; 12 lbs. spike, 90		9 30
16.	54 " iron, 3.20; 1 " C. rings, 25	3 49	
	150 lbs. spike, 11.25; 4 doz. wedges, 2.40	13 65	
	1,340 feet oak for frames, 45	60 30	
	125 " decking for ribbons, 45	5 62	
	246 " oak outside planking, "	11 07	
	11 inches knees deck-frame	4 12	
			98 25

	12 ft. pine for mould			24
17.	39 lbs. iron, 2.34; 1 cold chisel, 1.25			3 59
	½ day team			2 50
	150 feet oak bulwark, 6.75; 2 ho's m. work, 1.50			8 25
18.	110 lbs. spike, 8.25; 1 spike sett, 1.25			9 50
	4¾ days jig-sawyers, 14th inst	11 82		
	3 " carpenters	15		
	40 " "	120		
	1 " "	2 25		
			149	07
	½ day team		2	50
	10 ft. pine, 20; 5 lbs. nails, 40			60
19.	2,137 feet oak outside plank & ceiling, 45	96 6		
	164 " " stringer, 45	7 38		
			103	54
	Carried over		$451	93
110	August 19. Brot. over		451	93
	2 4½ S.-augers, 2.50; 140 lbs. spike 10.50	13 00		
	65 lbs. iron 3.70; ½ lb. C. rings, 12	4 02		
	244 ft. oak for rail, 45	10 98		
	277 " pine " water-ways	11 08		
			39	08
	¼ day team		1	25
20.	174 ft. oak, 45	7 83		
	2 hrs. planer, 4.00; 3 hrs. mach. work, 2.25	6 25		
			14	80
	56 lbs. iron, 3.36; 250 lbs. spike, 18.75		22	11
	¼ day team		1	25
21.	140 lbs. spike, 10.50; 42 lbs. iron, 2.52		13	02
	6 days carpenter	30		
	141¼ " " & caulker, 24	423 75		
	21¾ " " 20	6 87		
	½ " laborer	30		
	2 " caulker	7 00		
			467	92
	2½ " plainer		7	50
23.	10 lbs. spike			75
	710 feet oak monkey-rail, comm., & clamp under rail		32	45
24.	12 lbs. spike, 70; 37 ft. oak fender, 1.66		2	56
25.	12 ft. flooring, 36; 5 lbs. nails, 40; 2 dz. scs., 16	92		
	21 " decking, 94; 15 ft. box pine, 60	1 54		
	2 hrs. mach. work	1 50		
			3	96
27.	35 ft. flooring, 1.05; 600 deck plugs, 1.20		2	25
	14 lbs. iron, 84; 34 C. rings, 75		1	59
28.	19¼ days carpenters, 24s		57	75
30.	12 ft. oak, 54; 10 lbs. spike, 75	1 29		
	80 yds. 40-in. duck	42 40		
			43	69

	178 lbs. oakum, 26.70; 78 lbs. pitch, 3.90	30 60		
	4 " L. cotton, 1.40; 13 lbs. paint, 3.75	4 65		
111	1 mop, 60; 1 seam brush, 30	90		
				36 15
Sepr. 1.	55 ft. oak, 1.10; mach. work, 60; 9 pa. tax, 75			2 45
3.	18 " " 54; 1 hr. do., 75; 50 deck plugs, 10			1 39
4.	6 days carpenters			18 00
9.	40 feet oak, 1.20; ½ hr.'s mach. work, 38.			1 58
	6½ days carpenters, 24s			19 50
				$1,242 21

[Stamp. c. c.]

Recd. draft on Tug-Boat Association $1,242 21
CAMPBELL, OWEN & CO.

18 days carpenters $54 00

1,296 21

Tug Goodnow, per Capt. John Miner, to Flattery & Bro., Dr.

Sept. 30th, 1869:

	To 4 com. pillows, at 6s	$3	
	To 2 mattresses, largest size	6	
	To 1 small walnut bureau	12	
	To 9 cane-seat stools, 10s	11 25	
	To 1 arm-chair, wood seat	2	
	To 1 do. do. cane seat	2 50	
	To 2 glasses, 10s	2 50	
	To 3 washstands, 28s	10 50	
	To work on 6 cane-seat stools, all made over at shop, and painted and varnished, 5s	3 75	
112 (3)	To work on extension-table, all made over at shop, and stained and varnished	$10 00	
	To work on washstand	2 50	
			$66 00

[Stamp.]

Rec'd pay from G. H. Henchman, esq're, Detroit, July 6th, 1870.
(Signed) FLATTERY & BRO.

(Endorsed:) Tug William Goodnow, act., $66.00. Mr. Hinchman will pay this bill this week or next, July 6, '70; Flattery & Bros., p. July 20, '70.

DETROIT, *February 28th*, 1870.

Tug Goodnow to Wm. McMillan & Co., successors to Tefft, Casey & Kellogg, No. 44 Woodward avenue, Dr.

1869.			
Sept. 1.	Sheet lead, 10; 2 1¼-nipples, 30, 60; 2 1¼-elbows, 45, 90	1 60	
	1 1¼ union, 1.35; 2 hours man & helper, 55, 1.10	2 45	

	5½ ft. ⅜-iron pipe, 10, 55; 2 ft. ¼-in. do., 8, 16	71	
(4)	2 ⅜ in. jus., 18, 36; 2 ⅜-in. elbows, 12, 24; 3 ⅜-in. nipples, 36	96	
	1 " connecting-cock, 1.25; 1 saver handle, 25	1 50	
	3 hours man & helper, 55, 1.65	1 65	
	10. 38 lbs. sheet-iron escape pipe, 2	9 50	
113	5 hours man and helper, 55	2 75	
	Sepr. 17. 1 union, 50; 1 nipple, 12; 1 union, 80; 2½ hours work, 1.25	2 67	
	18. 244 lbs. sheet-iron exhaust-pipe, 2s.	61 00	
	3 days man and helper on elbows & filtrings, 5.50	16 50	
	stove-bolts, 40; 20 lb. smokestack for poney, 1s., 2.50	2 90	
	44 lb. stove-pipe and jacket, 1s., 5.50; 1 ventilator, 4	9 50	
	1 deck flange, 1.25; 10 hours man, 40, 4	5 25	
	106 lb. sheet-iron umbrella, 1s. 6	19 88	
	1 band & lugs, 4; 30½ ft. 1-in. iron pipe, 23, 7.01	11 01	
	3 1-in. elbow, 42, 1.26; 1–1 union, 1; 1½ day, man & help, 8.25	10 51	
	22. Sundries, by Capt. Miner	3 38	
	23. 3¼ lb. lubricating packing, 1.95; 1⅞ lb. rubber do., 1.70	3 65	
	24. 1¾ lb. copper-wire, 1.13; 1 1½-in. plug, 12	1 25	
	28. 1 large engineer's lamp	40	
	1 reflector, 75; 8 feet tubing, 28, 2.24	2 99	
	30. 1 9-in. reflector, 8s.; 1 lb. black lead, 2s.	1 25	
	strainer on oil-pipe	15	
			$173 41

Rec'd payment.
(Signed) WM. McMILLAN & CO.
P. W.

[Stamp.]

(Endorsed:) Tug Wm. Goodnow, per McMillan & Co., ⅜. Pd. May 19th, '70.

August.

Tug Goodnow to N. Peterson, Dr.

1869.
Sep. 20. For amount carpenter & joiner work as per contract ... $625
Received payment.
(5) (Duplicate.) (Signed) N. PETERSON.

114 *Tug Goodnow to Campbell, Owen & Co.*

1869.

August 13.	Work on stern-post and shoe:		
	1 5½-8 auger	1 25	
	54 feet oak for stern-post, 45	2 43	
			3 68
16.	84 " " shoe "	3 78	
	30 lb. iron	1 80	
			5 58
	2 doz. wedges		1 20
(6)	½ day team		2 50

18.	30 lb. iron, 1.80; 1 lb. C rings, 25		2 05
	8½ days, carpenters, &c., 14th		24 68
	12¼ " "		36 75
	Hauling rudder		5
			$81 44

Detroit, 11 Sept., '69.
Included in our proportion to repair the boat.
(Signed) J. S. NACHAN.
ROBT. J. HACKETT.
M. B. KEAN.

J. DESOTELL.] 411 ATWATER STREET, [WM. HUTTON.
Detroit, October 1st, 1869.

Tug Wm. Goodnow to Desotell & Hutton, boiler-makers, Dr.

Sept. 16.	To 322 lbs. iron for wheel	344, 10	34 40	
	To 12 " rivets			
	" 5 " stay-bolts	18	90	
(7)	" 25 " coal		25	
	" 1/10 day for forge		70	
115	" 10 6/10 " time, 26s		34 45	
	" 1 " boy, 18s		1 62	
				72 32
	" 50 lbs. rivets for rudder, 10		5	
	" 18 8/10 d's time on do., 26s		35 10	00
	" coal		20	
				40 30
				$112 62

Tug Wm. Goodnow to Dry-Dock Engine-Works.

1869.			
Aug'st 14.	To repairing stern-post & shoe		18 00
	To rivets & riveting stern-post & shoe		2 25
	To repairing rudder		7 50
20.	" 2 plates for rudder, 13 lb., 15		1 95
	" 9 hours of fitter & helper, drilling		
(8)	rudder		7 00
			36 70

451 ATWATER STREET,
Detroit, Mich., 187'.

TUG WM. GOODNOW:

[*Dry-Dock Engine Works. Wm. Cowie, Prest. & Treas. Wm. Cowie, jr, Sec'try. Directors, Wm. Cowie, E. D. Jones, R. Donaldson.*]

1869.				
July 23.	1 wrench repaired		60	
	1 rod & 2 edge-bolts for pumps, 11 lb. 15c		1 50	
	1 docket-wrench		3 18	
	(10) 1½ hours on bunk pattern		75	
116	24. 1 packing-hook		60	
	1 brush for poney, 15 lb. 60c		9 00	
	27. 1 pump-rod repaired, 1.40; 1 trammel, 50.		1 90	
	2 5/8-bolts, 25, packing for pump, 60		85	

	29.	1 bolt	60	
		12 hours turning poney	7 20	
		8 " fitter on "	3 60	
				29 78
August	9.	Straightening pipes	90	
		3 hours fitter on pipe	1 35	
		1 " turning	60	
	12.	7 " fitter on board	3 15	
		3 wedges, 12 lb. 13c	1 56	
		12 ¼ ties, 1.24; 1 1¼ nipple, 30; 1-¾ check-valve & nipple, 2.68	4 22	
		1 steam connecting-cock & 1¾ union	2 30	
	14.	repairing stern-post and shoe	18 00	
		1 chisel dressed, 15; 1 angle welded, 12	27	
	18.	1 spike-set repaired	50	
	19.	Rivets for stern-post	2 25	
		Repairing rudder	14 00	
	20.	3 bolts repaired, 62; 2 plates for rudder, 13 lb. 15, 1.95	2 57	
		1 hour drilling plates	20	
	23.	4 " fitting on valve-stem	1 80	
	25.	Repairing tiller & hand-wheel	2 00	
		1 wrench repaired	60	
	26.	4 wedges repaired	1 50	
		1 1 & 8 ⅝ bolts	1 90	
		1 hour turning bolts	60	
				60 57
Sept.	1.	4½ set-screws	1 25	
	8.	5 1-in. pins, & 3 ½ & 4 ⅝ in. bolts	2 50	
117	10.	3 sheaves, 24 lb., 6c	1 44	
		1 eye-bolt repaired	56	
		Amt's forward	5 75	90 35
1869.			5 75	90 35
Sept.	10.	Repairing chains	3 62	
		Boring sheaves	2 20	
	11.	Repairing and altering smoke-pipe stays	6 62	
		2 steering-rods repaired	75	
		1 hour turning bolt	60	
		14 fam leaders	4 70	
	20.	2 rails & 16 stanchions, 108 lb., 16c	17 28	
	21.	26 stanchions, 93 lb., 16c	14 88	
	22.	4 pieces railing, 78 lb., 16c	12 48	
		3 ⅝ bolts, 60; 1 hour fitter on cut-off, 45.	1 05	
		9½ hours drilling rod	4 75	
		2 " filler on flange	90	
		¾ " turning pipe	30	
		2 steering-rods, 24 lb., 12c	2 88	
	23.	18 rods for sky-light, 53 lb., 12c	6 36	
	29.	8 handrails & 25 ⅜ rods, 86 lb., 16c	13 76	
		20 staples	3 40	
	30.	3 fire-irons repaired	2 50	
		1 piece chain, 9 lb., 1s	1 12	
				105 93
				196 92

CR.

By 7 lb. old brass, @ 20c 1 40

$194 85

Received payment, Nov'r 14th, 1870.

WM. COWIE, JR., *Sec'ty.*

Dry-Docks Engine-Works, pd. Nov'r 15th, '70.

118 DETROIT, *Mich.*, *Sep. 14th*, 1869.

(10) *Tug Goodnow to William Wright & Co., Dr.*

House, sign, and fresco painters, decorators, gilders, & paper-hangers, wall-paper, window-shades, French & American window-glass, plate-glass, mirrors, picture-frames, engravings, chromos, and oil-paintings, 92 Woodward avenue.

To 62 lts.	glass,	8x13, 10c	6 20
10	do.	8x12, 10c	1 00
31	do.	11x15, 18c	5 58
26	do.	9x12, 11c	2 86
4	do.	9x17, 17c	68
8	do.	8x10, 8c	64

$16 96

JOHN MINER.

Rec'd pay't, May 20.

H. WRIGHT & CO.
OECEOINO.

(Endorsed:) Tug Goodnow. Guy F. Hinchman, (near P. & S.,) will pay 20th May. William Wright & Co. 16.94. Pd. 21, '70.

DETROIT, *Nov'r 1st*, 1869.

119 *Tug Association, pr. tug Wm. Goodnow, to Guy F. Hinchman & Co., ship-chandlers and grocers, 16 & 18 Atwater street, Dr.*

June	2.	To 29 lb. buoy-rope, 22		6 38
July	7.	" 3 C brooms	1 50	
		" 3 hicky	45	
		1½ rags, 31; & cot. waste, 60	91	
				2 81
(11)	22.	1 can & 4 gals. nap'tha	2 78	
		13 rags, 62; 1 lamp, 1.25	2 87	
		1 feeder, 50; 1 filler, 50	1 00	
		2 balls wick	30	
				6 92
	23.	2 doz. sheets E paper	50	
		4 contd. lye	1 00	
				1 50
	24.	32 yds. old canvass, 20		6 40
		90 M. rope, 25		22 50
		1 doz. of sheets E paper		25
		5½ ys. packing		1 38

$48 19

Received payment.
(Signed) G. F. HINCHMAN & CO.

Tug Wm. Goodnow to G. F. Hinchman & Co.

1869.

June	11.	To bill provision		62 78
August	26.	" 1 deck-scraper	1 00	
		1¾ marline & needle	50	
(12)		2 balls c. wick	25	
				1 75
		1 ball twine & 1 palm		75
Sep.	19.	153 lb. $\frac{5}{16}$ chain for pipe-gauge		19 13
	18.	2 4-in. trucks, 1.00; 1 halyard-cord		1 50
	24.	1 gal. black varnish		1 00
120	27.	1 lamp-filler, 50; 1 spout-can, 35	85	
		1 funnel, 15; 1 signal-lamp, $16.00	16 15	
		1 brass bin-lamp	3 00	
		2 gals't. blocks, 60; 3 needles, 15	75	
		6½ M. rope, 63; 1 hatchet, $1.00	1 63	
		1 brass compass, $10.00; 1 wood compass, $6.00	16 00	
				38 38
				125 29

Rec'd pay't.

G. F. HINCHMAN & CO.

(Endorsed:) G. F. Hinchman, ac., corner of Brush & Woodbridge streets. Detroit, Mich., Oct. 1st, 1869.

Tug W. Goodnow to James Flower & Brothers, Dr.

[Engineers and machinists, manufacturers of water, steam, and gas cocks, globe valves, &c., dealers in iron pipe & fittings.]

Sept.	8.	To 1 14 gong-bell	$16 00
	17.	" 1 8-lb. stm. whistle	64 00
		" 9 ft. 2½ iron pipe	8 10
		" cutting pipe	35
			88 45

JOHN MINER.

[Stamp.]

Rec'd payment, James Flower and Bros.

(Endorsed:) Flowers Bros., 1st July, 1870.

121 DETROIT, MICHIGAN, 12 *Sept.*, 1870.

Tug Goodnow to Campbell, Owen & Co., Dr.

[Ship-builders, repairers, joiners, dealers in all kinds of ship & other timber. Office cor. Atwater & Dequindre streets. Gordon Campbell, John Owen, E. G. Merrick, J. N. Fowler, Henry Esseltyn.]

6 lbs. oakum	90	
¼ day caulker	75	
		1 65

Rec'd pay't.

CAMPBELL, OWEN & CO.

(Endorsed:) C. D. & Co., p'd Oct. 12, '70.

TUG GOODNOW:

AUG. 25, '69.

1,417 ft. deck plank, at 2½ cts 35 43

Payment.

JOHN CADER.

DETROIT, *Sept.* 28th, '69.

Tug Goodnow to Charles J. Jubenville.

	August 31.	To 2 gallons linseed oil, @ $1.15	2 30
122	Sept. 4.	" 4 "	4 60
	" "	51 lbs. W. lead	7 00
Sept.	10.	To turpentine & dryers	50
"	13.	" labor, (cavassing)	1 75
"	16.	" 15 lbs. paint	3 00
"	17.	" 16 " "	3 20
"	"	11 " "	2 20
"	"	" paints for glass	30
"	"	" painting cabin floor	75
"	23.	" 12 lbs. paint	2 40
"	"	" glazing & putty	8 00
"	"	" extra graining	8 00
"	"	" " on house (after p. house)	6 00
"	"	" boxes & signal lights	2 00
"	"	" To original contract	145 00
			$197 00

Recd pay.

CHARLES J. JUBENVILLE.

For extra painting, about 20 00

(Endorsed:) C. J. Jubenville, 197.00.

DETROIT, *Sept.* 1st, 1870.

Capt. J. Miner to Joseph Klein, Dr.

1869	Balance due on old a/c	$33 00
1870	April 1, for boarding	"16 00
		49 00

123 Rec'd pay't.
Detroit, Oct. 3rd, 1870.

JOSEPH KLEIN,
Pr. J. CASPARY, *Agent.*

(Endorsed:) Oct. 3, '70.

Tug Goodnow to Campbell, Owen & Co.

Sept.	14.	1½ doz. screws	15
	18.	14 feet pine	42
		5½ days carpenters	16 50
	20.	18 feet box pine	72
		3½ day carp's & caulker	11 25
			29 04
Aug.	7.	a/c. rend	106 41
Sept.	4.	" "	81 44
			$216 89

Recd. pay't by G. F. Henchman & Co.

CAMPBELL, OWEN & CO.

[Stamp.]

(Endorsed:) Wm. Goodnow, June 11, '70. U. S. dist. court east. dist. Mich. Admiralty. Miner vs. Tug Goodnow, libellants. Exhibits B 2.

125 In the district court of the United States for the eastern district of Michigan, *ss.* In admiralty.

IN THE CASE OF JOHN MINER, OWNER TUG W. H. Goodnow,
vs.
THE BARK SUNNYSIDE AND HER BOATS, &C.

To the Hon. John W. Longyear, judge of the said court:

It having been, by a decree of said court made & entered in said cause, referred to the undersigned, a commissioner of said court, to ascertain, compute, & determine as well the damages sustained by said John Miner, libellant, as by H. W. Strong, owner of said bark Sunnyside, arising by reason of the collision forming the subject-matter of said cause, to take such testimony as might be offered in relation thereto and to report such damages, so ascertained, to said court; and the undersigned, having carefully examined the testimony taken on behalf of the libellant & the respondent, & having heard & maturely considered the arguments submitted by counsel for said parties respectively in reference to said damages, doth now report: That there is due to said libellant, John Miner, for & on account of the damages sustained by said tug Goodnow, on occasion of the collision of said tug with said bark Sunnyside, the sums following, to wit:

126

No. voucher.		
	For demurrage, three months at $15.00 a month, charter value	4,500 00
	For am't paid Jas. M. Ballentine for raising tug	2,507 50
	For use of tug Park in assist'g to raise, 9 days	900 00
	For " " " Sweepstakes " " " 10 hours	150 00
	For " " " Bob Anderson" " " 2 days	300 00
	Paid by Tug Association, incidental expenses in raising	101 00
1	Desotell & Hutton's bill, repairs to iron	345 45
2	Campbell's & Owen's account	1,142 21
	Carried over	$9,946 16
Voucher.	Brought over	9,946 16
2	Eighteen days, carpenter's time	54 00
3	Flattery & Bro's bill of furniture	45 00
4	Wm. McMillan & Co.'s bill, plumber's work	143 31
5	Peterson's bill, carpenter & joiners' "	530 00
6	Campbell & Owen's bill, work on stern-post and shoe	80 44
8	Dry Dock Engine Works, iron-work " " "	36 70
9	William Wright's bill for glass	12 96
10	Dry Dock Engine Works, repairs on machinery, &c	158 15
11	Guy F. Hinchman's bill, ship-chandlery	48 19
12	Do. 2nd do., " " [Deduct'g $62.78]	62 51
13	James Flowers & Bro's bill, gong, bell, whistle, &c	52 45
15	Campbell's & Owen's bill, caulking, &c	1 65
17	John Vade's bill, deck plank furnished	35 43
18	Charles Juterville's bill, painting, glazing, &c	177 00
19	Joseph Klein's bill, board of hands	49 00
20	Campbell & Owen's additional bill, carpenter's work	135 45
	Engineer's wages, $150; 2d engineer's, ditto, $21; John Miner's $345 (board & wages)	516 00
127	Libellant's disbursements for paint, $30; lumber, $1.30; clothes hooks & screws, $1.70; draying, $2; tacks & nails, $2; cleaning cabin and dishes, $11; labor in repairing, $12; for recovering steering wheel, $8; for board of men on Huron, $12; total	80 00
	Paid for ornamental work destroyed by collision	45 00
	Do " clock to replace one lost " "	12 00
	Total amount of libellant's ascertained damages	$12,221 40

Which said sum I respectfully report as the damages sustained by the said libellant on occasion of the collision aforesaid. Interest should also be allowed said libellant from September 30th, 1869, when the repairs were completed, and the amount ascertained up to the day of confirmation of report, and of entering decree in this cause.

I further report that it is stipulated by & between the parties to this suit (see stipulation annexed) that the damages sustained by said bark Sunnyside on occasion of the collision aforesaid, was the sum of two hundred dollars, ($200,) and that it cost said sum to repair and make good said damage. Interest should also be allowed on said sum from said Sept. 30th, 1869, to date of decree.

The court having ordered the damages to be divided, I further
128 report the following division of damages:

Damages of libellant Miner	$12,221 40	
Inte. to April 15, '72, 2 y., 6 m., 15 d	2,174 13	
Total libellant's da's		$14,395 53
Damages of respondent Strong	$200 00	
Int. to April 15, '72, 2 yr., 6 m., 15 d	35 50	
Total respondents		235 50
Dividing by one-half		2) 14,631 03
Give as the amount of da's to be paid by respondent		$7,315 51

I herewith file the testimony taken and the exhibits filed by both of the parties to said case.

All of which is respectfully submitted.

[L. S.] (Signed) WM. D. WILKINS,
U. S. Comm'r East Dist. Mich.

Dated April 15th, 1872.

U. S. commissioner's fees on above matter of reference.

Drafting report 12 f. Tak'g depositions 50 f. 62 f. a 20 c.	$12 40
Swear'g 5 witnesses, 50 c., fil'g, mark'g, & numbering 17 exhi'ts a 10c., $1.70	2 20
1872. Jan'y 3rd & 4th, *Filing* 1 & 19, March 16 & April 13th. Attending as commissioner under order of reference, 6 days, at $3.	18 00
Total Comm'r Wilkins' fees	$32
Notary Brown's fees on respondent dep'n attached	2 00
Total fees under reference	$34 60

Filed April 15th, 1872.

(Signed) D. J. DAVISON, *Clerk.*

129 The district court of the United States for the eastern district of Michigan. In admiralty.

JOHN MINER, OWNER OF THE TUG GO'DNOW
vs.
THE BARK SUNNYSIDE.

The respondent in this cause, by F. H. Canfield, his proctor, hereby excepts to the report of the commissioner herein filed on the 15th day

of April, 1872; that is to say, he excepts to the allowance of the following items as damages to the libellant, viz:

Deduction 3,867.50. 1st.	Demurrage, 3 months, at $1,500 per month	$4,500 00
	Amount paid Ballentine for raising tug.....	2,507 50
Exception overruled.	For use of tug Park in raising tug.....	900 00
	" " " Sweepstakes " " 10 hours.....	150 00
	" " " Bob Anderson " "	300 00
Exception sustained entire.	Paid by Tug Association, incidental expenses in raising.....	101 00
Voucher 1.	Campbell & Owen's bill, (caulking)	1 65
Deduct $1 6. 19.	Joseph Klein's bill for boarding.....	49 00
$115 deduct.	John Miner's board & wages	345 00
	2 engineers' wages.....	21 00
	Board of men on Huron.....	12 00
	Labor in repairing.....	12 00

(Signed) F. H. CANFIELD,
Respondent's Proctor.

Filed April 22d, 1872.
(Signed) D. J. DAVISON, *Clerk.*

130 The district court of the United States for the eastern district of Michigan. In adm'ralty.

JOHN MINER
vs.
THE BARQUE SUNNYSIDE.

It is hereby stipulated and agreed that the tug William Goodnow was put into the Tug Association of 1869 at a valuation of $23,000, and that this valuation may be exhibited as a basis for determining the damages for detention.

(Signed) F. H. CANFIELD,
Proctor for Respondent.
NEWB. POND & BROWN,
Libellant's Proctors.

Filed May 30th, 1872.

D. J. DAVISON, *Clerk*,
By JNO. GRAVES, *Dept.*

The district court of the United States for the eastern district of Michigan. In admiralty.

JOHN MINER
vs.
THE BARQUE SUNNYSIDE.

It is hereby stipulated in the above cause that the tug William Goodnow was received into the Tug Association for 1869, at a valuation
131 of twenty-three thousand dollars, and that the said court in determining the damage for detention of the said tug may estimate the same upon the basis of the same valuation, in case the court should consider the said valuation material to the amount of damages.

(Signed) F. H. CANFIELD,
Proctor for Respondent.
NEWB. POND & BROWN,
Proctors for Libellants.

At a session of the district court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district-court room, in Detroit, on Monday, the twenty-seventh day of May, in the year of our Lord one thousand eight hundred and seventy two.

Present, the honorable John W. Longyear, district judge.

JOHN MINER
vs.
THE BARQUE SUNNYSIDE, HER BOATS, &C. } On libel and cross-libel for collision.

AND

H. NORTON STRONG
vs.
TUG GOODMAN, HER ENGINE, &C. } In admiralty.

On reading and filing the report of William D. Wilkins, United States commissioner, to whom it was referred to assess and report the damages sustained by the libellants in the said cause, by which there is
132 reported due to the libellant, John Miner, for his said damages the sum of seven thousand three hundred and fifteen dollars and fifty-one cents, ($7,315.51,) being one-half of the whole damages reported as sustained; and on reading and filing the exceptions of claimant thereto, and on hearing the arguments of the respective parties, it is now by the court ordered and adjudged that the exceptions relating to the item of demurrage be sustained to the amount of three thousand eight hundred sixty-seven dollars and fifty cents ($3,867.50) only; that the exception relating to the bill of Campbell & Owen for caulking be wholly sustained; that the exception relating to Joseph Kline's bill for boarding be sustained to the amount of sixteen dollars ($16) only; that the exception relating to John Miner's bill for board and wages be sustained to the amount of one hundred and fifteen dollars ($115) only; and that the residue of said exceptions be, and the same are hereby, overruled and disallowed.

And it is further ordered, adjudged, and decreed that the said libellant, John Miner, do recover of the claimant, H. Norton Strong, in this cause the sum of four thousand nine hundred fifty-nine dollars and fifty-nine cents, (4,959.59,) with interest thereon from April 15, 1872, the date of the commissioner's report, together with costs of suit to be taxed; and it is further ordered that the claimant, H. Norton Strong, recover of the libellant, John Miner, his costs upon said exceptions to the said report.

And it appearing that said barque Sunnyside has been duly
133 bonded by H. Norton Strong as claimant thereof, with Hugh Coyne as surety, by their bond as stipulation, in the sum of twenty-six thousand two hundred dollars, conditional to abide the decree of this court, and to pay the award thereof, and assenting that unless they should so do execution should issue against them therefor.

Now, on motion of Newberry, Pond & Brown, proctors for said libellant, John Miner, it is further ordered, adjudged, and decreed that judgment be, and the same is hereby, entered up against the said H. Norton Strong, principal, and Hugh Coyne, surety as aforesaid, for the aforesaid sum of four thousand nine hundred fifty-nine dollars and fifty-nine cents, ($4,959.59,) together with interest and costs as aforesaid; and it is further ordered, that unless the said damages with interest and costs as aforesaid shall be paid into the registery of this court within twenty

days from this date, execution do issue therefor in due form against the said principal and surety or said bond or stipulation.

And on like motion it is further ordered that the said libellant, Miner, have leave to amend his libel filed herein.

Thereupon Mr. Canfield, proctor for the claimant, Strong, in this cause, gives notice of his intention to take an appeal in this to the circuit court of the United States for the eastern district of Michigan, and twenty days are granted by the court for perfecting said appeal.

134 District court of the United States for the eastern district of Michigan. In admiralty.

JOHN MINER
vs.
THE BARK SUNNYSIDE.

AND

H. NORTON STRONG
vs.
THE TUG GOODNOW. } Libel & cross-libel for collision.

Whereas it is necessary to carry into effect the order of the court in this cause, that the damages of both said vessels should be equally divided between the parties, that the amount of damages suffered the said barque Sunnyside be deducted from one-half the damages suffered by the said tug Goodnow, it is therefore stipulated that the decree in this cause be amended by deducting therefrom the amount of damages reported by the commissioner as having been suffered by said barque, to wit, the sum of $235.50, and that the decree heretofore entered stand as a final decree in favor of the libellant for four thousand seven hundred and twenty-four dollars and nine cents, ($4,724.09.)

(Signed) NEWB., POND & BROWN.

Filed June 5, 1872.

D. J. DAVISON, *Clerk.*

At a session of the district court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment at the district court-room in Detroit, on Wednesday, the fifth day of June, in the year of our Lord one thousand eight hundred and
135 seventy-two.

Present, the honorable John Longyear, district judge.

JOHN MINER
vs.
THE BARK SUNNYSIDE, HER BOATS, &C., } On libel and cross-libel for collision. In admiralty.

AND

H. NORTON STRONG
vs.
THE TUG GOODNOW, HER ENGINE, &C.

On reading and filing the stipulation in writing of Messrs. Newberry, Pond & Brown, proctors for said libellant, John Miner,

It is now by the court ordered, adjudged, and decreed that the final decree heretofore entered in these causes be, and the same is hereby, corrected by deducting from the amount therein decreed to libellant, John Miner, for his damages, the sum of two hundred thirty-five dol-

lars and fifty cents, ($235.50,) being the amount of the damages reported as sustained by the said barque Sunnyside, and that the decree heretofore entered in these causes stand as a final decree in favor of the libellant, John Miner, for the sum of four thousand seven hundred and twenty-four dollars and nine cents, (4,724.09.)

District court of the United States for the eastern district of Michigan.
In admiralty.

JOHN MINER, LIBELLANT,
vs.
BARQUE SUNNYSIDE, H. NORTON STRONG, owner.

136 The above-named respondent conceiving himself aggrieved by the *by the* final decree of this court, made on the 27th day of May, 1872, in the above-entitled cause, doth hereby appeal therefrom and from the whole thereof to the next circuit court of the United States for the eastern district of Michigan, & he prays that this his appeal may be allowed, & that said cause may be duly certified to said circuit court. And he hereby gives notice that he will make new proofs under the allegations of the libel and answer in said cause.

(Signed) H. NORTON STRONG,
Respondent,
By F. H. CANFIELD,
Proctor.

F. H. CANFIELD,
Respondent's Proctor.

We admit due service of notice of appeal in this cause.
(Signed) NEWB., POND & BROWN,
Libellant's Proctors.

Filed June 5th, 1872.
D. J. DAVISON, *Clerk.*

The district court of the United States for the eastern district of Michigan. In admiralty.

Whereas an appeal has been taken from the decree of this court, made on the 27th day of May, 1872, in a certain cause wherein John Miner is libellant against the barque Sunnyside, her tackle, &c., and H. Norton Strong, claimant, by the said claimant:

Now, therefore, the stipulators undersigned hereby stipulate in the sum of nine thousand dollars to pay all damages and costs which shall be awarded against the said appellant by the final decree rendered by the appellate court.

(Signed) H. N. STRONG. [SEAL.]
(Signed) H. COYNE. [SEAL.]

137 Subscribed and acknowledged before me this 6th day of June, A. D. 1872.
(Signed) D. J. DAVISON,
U. S. Commissioner, East. Div., Michigan.

Approved:
JOHN W. LONGYEAR,
District Judge.

Filed June 6th, 1872.
D. J. DAVISON, *Clerk.*

District court of the United States for the eastern district of Michigan.
In admiralty.

H. NORTON STRONG, LIBELLANT,
vs.
THE STEAM-TUG GOODNOW, HER ENGINES, &C.,
John Miner, owner, respondent.

The above-named libellant conceiving himself aggrieved by the final decree of this court, made on the day of May, 1872, in the above-entitled cause, hereby appeals therefrom, and from the whole thereof, to the next circuit court of the United States for the eastern district of Michigan, & prays that this, his appeal, may be allowed, and that said cause may be duly certified to said court.

And he hereby gives notice that he will make new proofs upon
138 said appeal under each allegation contained in the pleadings filed in said cause.

(Signed) H. NORTON STRONG, *Libellant*,
By F. H. CANFIELD, *his Proctor*.

F. H. CANFIELD, *Proctor for Libellant:*

We hereby admit due service of notice of appeal in this cause.
(Signed) NEWB., POND & BROWN.

Filed June 5th, 1872.

D. J. DAVISON, *Clerk*.

The district court of the United States for the eastern district of Michigan. In admiralty.

Whereas an appeal has been taken from the decree of this court, made on the 27th day of May, 1872, in a certain cause wherein H. Norton Strong is libellant, against the steam-tug Goodnow, her engines, &c., and John Miner, claimant, on a cross-libel, for collision by the said libellant:

Now, therefore, the stipulators undersigned hereby stipulate, in the sum of two hundred fifty dollars, to pay all damages and costs which shall be awarded against the said appellant by the final decree rendered by the appellate court.

(Signed) H. N. STRONG. [SEAL.]
(Signed) H. COYNE. [SEAL.]

Subscribed and acknowledged before me on this 6th day of June, 1872.

D. J. DAVISON,
U. S. Comm'r, East. Dist. Mich.

Approved:

JNO. W. LONGYEAR,
District Judge.

139 EASTERN DISTRICT OF MICHIGAN, *ss:*

Hugh Coyne, of the city of Detroit, in said district, being duly sworn, deposes and says he is justly worth the sum of fifty thousand dollars, after the payment of his just debts, in real and personal estate

situated in the eastern district of Michigan, and which is subject to execution.

(Signed) H. COYNE.

Subscribed and sworn before me this 6th day of June, A. D. 1872.

D. J. DAVISON,
U. S. Comm'r, East. Dist. Mich.

Filed June 6th, 1872.

D. J. DAVISON, *Clerk.*

EASTERN DISTRICT OF MICHIGAN, *ss :*

I, Darius J. Davison, clerk of the district court of the United States for said district, do hereby certify the above and foregoing document and record to be the record in appeal in said court in the case of John Miner, libellant and appellee, against the barque Sunnyside, her boats, &c., H. Norton Strong, claimant and appellant; and H. Norton Strong, libellant and appellant, against the tug Goodnow, her engine, &c., John Miner, claimant and appellee, being the original process, pleadings, depositions, and true copies of all interlocutory and final orders and decrees of the district court in said cause.

Witness my hand and the seal of said court, at Detroit, this 1st day of August, A. D. 1872.

[SEAL.] D. J. DAVISON, *Clerk.*

140 Transcript on appeal filed in clerk's office of circuit court U. S., eastern district of Michigan, August 1, 1872.

ADDISON MANDELL, *Clerk.*

141 At a session of the circuit court of the United States for the eastern district of Michigan, continued and held pursuant to adjournment, at the district court-room in the city of Detroit, on Thursday, the ninth day of January, in the year one thousand eight hundred and seventy-three.

Present, Hon. Holmer H. Emmons, circuit judge.

JOHN MINER, OWNER OF TUG GOODENOW, libellant & appellee,
vs.
THE BARQUE SUNNYSIDE, H. NORTON STRONG, claimant & appellant.
} On appeal from U. S. district court.

and

H. NORTON STRONG, OWNER OF BARQUE SUNNYside, libellant and appellant,
vs.
THE TUG GOODENOW, JOHN MINER, CLAIMANT & appellee.
} On appeal from U. S. district court.

These cases, coming on together on appeal from the district court of the United States for the eastern district of Michigan, are argued by counsel on either side in the respective cases, and submitted to the court for decision.

142 And thereupon, afterwards, to wit, on the second day of April, A. D. 1873, the parties came into open court and suggested the

death of said H. Norton Strong, whereupon the *the* following order was entered in open court on that day, to wit:

JOHN MINER, OWNER OF TUG GOODENOW, libellant & appellee,
vs.
THE BARQUE SUNNYSIDE, H. NORTON STRONG, claimant & appellant.
} On appeal from the district court of the U. S. for the eastern district of Michigan.

and

H. NORTON STRONG, OWNER OF BARQUE SUNNYside, libellant & appellant,
vs.
THE TUG GOODENOW, JOHN MINER, CLAIMANT & appellee.
} On libel and cross-libel for collision.

And now on this day came the parties by their respective proctors, and thereupon the counsel for the claimant and appellant in the original suit, and the libellant and appellant in the cross-suit, gives the court to understand and be informed that since this cause was submitted for the decision of this court, and before this day, to wit, on the third day of March, A. D. one thousand eight hundred and seventy-three, the said H. Norton Strong died, and that Thomas Pitts has beeen duly appointed executor of the last will and testament of the said H. Norton Strong,
143 deceased, which the said proctor for the libellant in said original suit doth not deny, but admits the same to be true. And on further motion it is ordered that said Thomas Pitts, executor of the last will and testament of H. Norton Strong, deceased, be made and admitted a party claimant and appellant in said original suit, and allowed to defend the same, and a party libellant and appellant in said cross-suit, and allowed to prosecute the same.

And thereupon, on said second day of April, A. D. 1873, the said circuit court pronounced its judgment in said cause on libel & cross-libel in the words and figures following, to wit:

Judgment & decree.

This cause having been fully argued as one suit by counsel on either side, and the record and proceedings of the court below being seen and inspected and fully considered by this court, and mature deliberation being thereupon had, it is now considered, adjudged, and decreed by this court that the decree and judgment of the court below in this cause be reversed.

And it is further considered, adjudged, and decreed by the court now here, that Thomas Pitts, executor of the last will and testament of H. Norton Strong, deceased, owner of the barque Sunnyside, the libellant and appellant in said cross-suit, do recover of the said John
144 Miner, claimant and appellee, the sum of two hundred and fifty-three dollars and twenty-four cents, ($253\frac{24}{100}$,) together with the costs and charges of the said appellant in said cross-suit in this court and also in the court below, to be taxed.

And it is further considered, adjudged, and decreed by this court that the libel filed by said John Miner against the barque Sunnyside be, and the same is now, by the court here, dismissed, with costs against the said

John Miner, to be taxed in this court and in the court below, and it appearing that Guy F. Hinchman is the surety for and behalf of said John S. Miner, it is considered, adjudged, and decreed that, unless the said damages and costs are paid within ten days from this date, execution for the same d*ue* issue against the said John S. Miner, and also against the said Guy F. Hinchman, his surety.

Claim of appeal & allowance of appeal.

And thereupon, on said second day of said April, the said libellant and appellee came into court and claimed an appeal in open court in the words following, to wit:

And now comes the said John Miner, libellant and appellee in said cause, and claims an appeal from the judgment and decree of this court therein to the Supreme Court of the United States, which appeal
145 is now allowed by this court and a bond ordered in the penal sum of one thousand dollars from said libellant, John Miner, to Thomas Pitts, executor of the last will and testament of H. Norton Strong, deceased, claimant and appellant in said cause.

146 The Supreme Court of the United States.

JOHN MINER, LIBELLANT & APPELLANT,
vs.
THE BARQUE SUNNYSIDE; H. NORTON STRONG, claimant & appellee.

To the honorable the Supreme Court of the United States:

The appeal of John Miner, the above-named libellant and appellant, respectfully shows:

That on or about the twenty-ninth day of September, A. D. 1869, he, this appellant, filed his libel in the district court of the United States for the eastern district of Michigan against the said barque Sunnyside, her boats, tackle, apparel, and furniture, in a cause civil and maritime, for the recovery of damages alleged to have been sustained by the steam-tug William Goodenow through a collision with the barque Sunnyside on Lake Huron.

That said barque was arrested upon process issued upon said libel.

That afterwards, to wit, on or about the thirtieth day of October, A. D. 1869, the said H. Norton Strong, claimant and appellee,
147 filed his answer to the said libel, together with a cross-libel against the said tug William Goodenow, for the recovery of damages alleged to have been sustained by the said barque.

That afterwards such proceedings were had in said cause that, on the twenty-seventh day of May, A. D. 1872, a final decree was made and pronounced therein by said district court, wherein it was in substance adjudged that this libellant recover against the barque Sunnyside, her boats, tackle, apparel, and furniture, the sum of four thousand nine hundred and fifty-nine dollars and thirty-nine cents, together with his costs—the said court having adjudged and decreed that the damages sustained by both vessels by reason of said collision should be equally divided between them.

That after the said final decree the said H. Norton Strong duly appealed therefrom to the circuit court of the United States for the

eastern district of Michigan, and the said cause was removed thereby into the said circuit court and there tried anew.

That such proceedings were had in the said circuit court that, afterwards, and to wit, on the second day of April, A. D. 1873, the said circuit court made a final decree in the said cause, whereby it was decreed that the said decree of the district court be reversed, and the libel of the libellant be dismissed; and that Thomas Pitts, execu-
148 tor of the last will and testament of H. Norton Strong, who died pending the adjudication of said cause, recover against the said tug the sum of two hundred and fifty-three dollars and twenty-four cents; which said decree of said court, as this appellant is advised, is erroneous, and ought to be reversed.

Wherefore this appellant appeals from the whole of the said decree of the said circuit court to the Supreme Court of the United States, and respectfully prays that the said decree of the said circuit court, and that the libel and answer, pleadings, evidence, and proceedings may be sent to the Supreme Court of the United States without delay; and that the said Supreme Court will proceed to hear the cause anew, and that said decree of the said circuit court may be reversed with costs.

And that your libellant may recover against the barque Sunnyside the amount awarded by the said district court, and for such other relief as to the Supreme Court shall seem just.

NEWBERRY, POND & BROWN,
Proctors for Libellant and Appellant.

Filed in clerk's office April 14, 1873.

A. MANDELL, *Clerk.*

149 The Supreme Court of the United States.

THOMAS PITTS, EXECUTOR OF THE LAST WILL & testament of H. Norton Strong, deceased, libellant & appellee,
vs.
THE TUG WILLIAM GOODENOW; JOHN MINOR, claimant and appellant.

To the honorable the Supreme Court of the United States:

The appeal of John Minor, the above-named claimant, respectfully sheweth:

That on or about the twenty-ninth day of September, A. D. 1869, he, this appellant, filed his libel in the district court of the United States for the eastern district of Michigan against the barque Sunnyside, her boats, tackle, apparel, and furniture, in a cause civil and maritime, for the recovery of damages alleged to have been sustained by the steam-tug William Goodenow through a collision with the said barque Sunnyside upon Lake Huron.

That said barque was arrested by process issued upon said libel; that afterward, to wit, on or about the thirtieth day of October, A. D.
150 1869, the said H. Norton Strong filed his answer to said libel, together with a cross-libel against the said tug William Goodenow, for the recovery of damages alleged to have been sustained by the said barque.

And that, afterwards, this appellant filed his answer to the said libel.

That, afterwards, such proceedings were had in such cause that on the twenty-seventh day of May, A. D. 1872, a final decree was made and pronounced in both of said causes by the said district court, wherein

it was, in substance, adjudged that this appellant recover against the barque Sunnyside, her boats, tackle, apparel, and furniture, the sum of four thousand nine hundred and fifty-nine dollars and thirty-nine cents, together with his costs, the said court having adjudged and decreed that the damages sustained by both vessels, by reason of said collision, should be equally divided between them.

That after the said final decree the said H. Norton Strong duly appealed therefrom to the circuit court of the United States for the eastern district of Michigan, and the said cause was removed into the said circuit court and there tried anew; that such proceedings were had afterwards in the said circuit court that, to wit, on the second day of April, A. D. 1873, the said circuit court made a final decree in the said cause,
whereby it was decreed that the said decree of the district court
151 be reversed, and that the libellant of the appellant be dismissed,
and that Thomas Pitts, executor of the last will and testament of the said H. Norton Strong, who died pending the adjudication of said cause, recover against the said tug Goodenow the sum of two hundred and fifty-three dollars and twenty-four cents, with his costs of the decree of said circuit court, which appellant is advised is erroneous and ought to be reversed.

Wherefore this appellant appeals from the whole of the said decree of the said circuit court to the Supreme Court of the United States, and respectfully prays that the said decree of the said circuit court, and the libel and answer, cross-libel, pleadings, evidence, and proceedings may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the cause anew and without delay, and that the said decree of the said circuit court may be reversed with costs; and that the suit of the said Thomas Pitts, executor as aforesaid, may be dismissed; and for such other relief as to the Supreme Court shall seem just.

NEWBERRY, POND & BROWN,
Proctors for Claimant and Appellee.

Filed in clerk's office April 14, 1873.

A. MANDELL, *Clerk.*

152 The circuit court of the United States for the eastern district of Michigan. In admiralty.

JOHN MINER, LIBELLANT & APPELLANT,
vs.
THE BARQUE SUNNYSIDE; THOMAS PITTS, executor of the last will and testament of H. Norton Strong, claimant & appellee.

Know all men by these presents that we, Ashley Pond, Henry B. Brown, William A. Moore, and Levi T. Griffin, of Detroit, in the State of Michigan, are held and firmly bound unto Thomas Pitts, executor of the last will and testament of the above-named H. Norton Strong, appellee, in the sum of one thousand dollars, to be paid to the said Pitts, for payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our respective heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated the 14th day of April, in the year of our Lord one thousand eight hundred and seventy-three.

Whereas the above-named appellant has prosecuted an appeal to the said Supreme Court of the United States, at the city of Washington, in

the District of Columbia, to reverse the decree rendered in the above suit by the circuit court of the United States for the eastern district of Michigan:

153 Now, therefore, the condition of this obligation is such that if the above-named appellant shall prosecute his appeal to effect, and answer all damages and costs if he fails to make his appeal good, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

ASHLEY POND.
HENRY B. BROWN.
WM. A. MOORE.
LEVI T. GRIFFIN.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Ashley Pond, Henry B. Brown, William A. Moore, Levi Griffin, being duly sworn, each for himself doth depose and say that he is worth the sum of two thousand dollars over and above all his just debts and liabilities.

Sworn and subscribed to this fourteenth day of April, A. D. 1873, before me.

FRED. W. CLARKE,
Notary Public, Wayne County, Michigan.

I approve of the above bond and the sufficiency of the sureties thereto, and waive citation and approval of the judge.

F. H. CANFIELD,
Proctor for Appellee.

Filed April 15, 1873, in the clerk's office.

A. MANDELL, *Clerk*,
By JNO. GRAVES, *Dpy.*

154 The circuit court of the United States for the eastern district of Michigan. In admiralty.

THOMAS PITTS, EXECUTOR OF THE LAST WILL & testament of H. Norton Strong, deceased, libellant and appellee,
vs.
THE TUG WILLIAM GOODENOW, JOHN MINER, claimant & appellant.

Know all men by these presents that we, Ashley Pond, Henry B. Brown, William A. Moore, and Levi T. Griffin, of Detroit, in the State of Michigan, are held and firmly bound unto Thomas Pitts, executor of the last will and testament of the above-named H. Norton Strong, libellant and appellee, in the sum of one thousand dollars, to be paid to the said Pitts, for payment of which, well and truly to be made, we bind ourselves and each of us, our and each of our respective heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated the 14th day of April, in the year of our Lord one thousand eight hundred and seventy-three.

Whereas the above-named appellant has prosecuted an appeal
155 to the said Supreme Court of the United States, at the city of Washington, at the District of Columbia, to reverse the decree

rendered in the above suit by the circuit court of the United States for the eastern district of Michigan:

Now, therefore, the condition of this obligation is such that if the above-named appellant shall prosecute his appeal to effect, and answer all damages and costs if he fails to make his appeal good, then this obligation shall be void; otherwise the same shall remain in full force and virtue.

ASHLEY POND.
HENRY B. BROWN.
W. A. MOORE.
LEVI T. GRIFFIN.

EASTERN DISTRICT OF MICHIGAN, *ss:*

Ashley Pond, Henry B. Brown, William A. Moore, & Levi T. Griffin, being duly sworn, each for himself doth depose and say that he is respectively worth the sum of two thousand dollars over and above all his just debts and liabilities.

Sworn and subscribed to this fourteenth day of April, A. D. 1873, before me.

FRED. W. CLARKE,
Notary Public, Wayne County, Michigan.

I approve of the above bond and the sufficiency of the sureties thereto, and waive citation and approval of judge.

F. H. CANFIELD,
Proctor for Appellee.

Filed April 15, 1873, in clerk's office.

A. MANDELL, *Clerk*,
By JNO. GRAVES, *Depy.*

156 The circuit court of the United States for the eastern district of Michigan. In admiralty.

JOHN MINER
vs.
THE BARQUE SUNNYSIDE, AND THOMAS Pitts, executor, on the part of the tug Goodenow.

The clerk of the said court will please make up and forward as soon as possible to the clerk of the Supreme Court of the United States a transcript of the pleadings, proofs, and records in the said cause.

NEWB., POND & BROWN,
Proctors for Appellant.

Filed in clerk's office April 16, 1873.

A. MANDELL, *Clerk.*

157 CASE OF JOHN MINER, OWNER OF TUG Wm. Goodenow,
vs.
BARQUE SUNNYSIDE.

Opinion of Judge Longyear, in district court, April 5, 1871, on libel and cross-libel for collision.

The collision occurred in Lake Huron, some five or six miles off and a little above the port of Lexington, in the State of Michigan, at about

three o'clock in the morning of 14th day of June, 1869. The night was clear, and although it was not yet daylight, the morning had dawned, and a vessel could be seen from one and a half to two miles distance. The wind was southwest. The tug was then, and for several hours previously had been, waiting for a tow. She had her bright and colored lights burning, and although her steam was up, her machinery was not in motion, and she was lying entirely still, except that she was drifting before the wind in a northeasterly direction at the rate of from one to two miles per hour. At the time of the collision she was heading eastwardly, or. as some of the witnesses say, east by north half north.

The bark was on a voyage from Erie to Chicago with a cargo of coal, and at the time of the collision was, and for some hours pre-
158 viously had been, sailing on a course north half west; she had all sails set, and was moving through the water at the rate of about nine miles per hour. The bark struck the tug while the latter was lying as above described, hitting her just forward of the pilot-house at about right angles, or perhaps angling a very little forward, crushing in her timbers and causing her to sink in about fifteen minutes.

The fault charged in the libel against the bark is, a sudden change of course when in dangerous proximity to the tug, thereby causing the collision.

The defense set up by the answer for the bark, and the faults charged against the tug by the answer and cross-libel, are:

1. The change of course alleged against the bark is denied.

2. It is denied that the tug's officers and men were properly stationed, and attention to their duties and the contrary is charged

3. It is charged that the tug lay where she did, directly in the path of vessels, without proper lights, with no lookout or officer on deck; a mere obstruction to navigation.

4. "That about three o'clock the barque, heading as above, with all sail set, was proceeding on her course a few miles off Lexington
159 in the usual frequented track of vessels; a bright and green light was discovered a little over the port bow, indicating a steamboat standing to the eastward. That said barque was kept steadily on her course until a collision was inevitable, when the helm of the barque was ordered hard up, to ease the blow, if possible; but before said order could take effect the barque and tug collided.

The evidence shows that the lights of the tug were seen from the bark as above stated, when one and a half to two miles distant.

Mr. Brown (Newberry, Pond & Brown) and Mr. W. A. Moore, (Moore & Griffin) for the tug Wm. Goodenow.

Mr. Canfield & Mr. Lothrop for the bark Sunnyside.

LONGYEAR, *J.*

The only fault attributed to the bark by the libel, viz, a change of course, is not sustained by the proof; but on the contrary it clearly appears that the bark kept her course without any variation up to the moment of collision. If the trial had been confined to this one allegation of fault, the libel should clearly be dismissed. But such is not the case. A large portion of the testimony, admitted without objection, relates to other questions of fault on the part of the bark and of excuse on the part of the tug than those set up in the libel; and although
160 the objection was made at the argument, the case was really tried and submitted upon those other questions. The case has no doubt been as fully and fairly tried, and can be as satisfactorily disposed of in its present position, as it could be if the present libel were dismissed and

a new one filed covering the case more fully as made by the testimony. The court will therefore, in the exercise of that broad discretion possessed by it, allow the libel to be amended, and dispose of the case upon the merits as really presented and submitted at the hearing. (The Syracuse, 12 Wall., 167, 173; the Adeline, 9 Cranch, 244.)

It is clear to my mind that gross faults are attributable to both vessels in this case.

First. As to the tug. The tug showing, as she did, the lights of a steam-vessel in motion, must be held to the responsibilities and duties of such vessel. By article 15 of the collision act of 1864, it was the duty of the tug to keep out of the way of the bark, provided the bark kept her course, as was her duty under article 18. The bark, as we have seen, did keep her course. Therefore the tug is clearly in fault in not keeping out of the way of the bark, unless the excuses set up for her, or some of them, are tenable.

The excuses set up. It is contended on behalf of the tug that
161 she had a right to lay where she was lying, in wait for a tow, and that it was customary for tugs to do so. The tug, no doubt, had the right claimed, but while exercising that right she had no right to exhibit the lights of a steam-vessel in motion, and thereby mislead other vessels as to her status and intentions. If she would exercise that right in the night-time, in such a manner as to exempt herself from the duty imposed by article 15, she must do so at anchor and with her anchor-light up.

It is also contended on behalf of the tug that some portions of her engine or machinery were partially disabled, in consequence of which she could not get under motion readily when lying still.

This excuse is clearly untenable, because, 1st, it appears that no effort whatever was made to put her in motion; and 2d, it does not appear but there had been ample opportunity for repairs since the disability was known to exist.

The tug, then, was clearly in fault in not keeping out of the way of the bark.

Second. As to the bark. The duty of a steam-vessel to keep out of the way of a sailing-vessel, and of the latter to keep her course, does not excuse the sailing-vessel from the observance of ordinary care in
162 her navigation, nor from the use of such means as may lay in her power to avoid a collision in case of immediate danger, even though that danger may have been made imminent by a non-observance of duty on the part of the steam-vessel. Such I understand to be the effect of article 19, which is as follows: "In obeying and construing these rules, due regard must be had to all dangers of navigation, and due regard must also be had to any special circumstances which may exist in any particular case, rendering a departure from the above rules necessary in order to avoid immediate danger." That is to say, these rules are made expressly for preventing collisions. Now, if under "any special circumstances which may exist in any particular case it is necessary to depart from these rules in order to accomplish the very object the rules are intended to accomplish, then it is just as much the duty of a vessel to depart from the rules as it is under other circumstances to observe them. It will not do to say that because one vessel shall have failed to do its duty the other is thereby licensed to run her down and destroy her when such a consequence may be avoided by the exercise of ordinary care and precaution. And yet in order to
163 exonerate the Sunnyside from blame in this case we must adopt

that theory. (The Maria Martin, 12 Wall., 31, 47. See, also, article 20.)

The bright and green lights of the tug were seen and reported by the lookout on the Sunnyside when one and a half to two miles distant. The lights were so seen a little over the port bow of the bark, and clearly indicated a steam-vessel headed to the eastward and across the bows of the bark. When the tug's lights were reported by the lookout, the mate, then in charge of the navigation of the bark, came forward and looked at the tug's lights, and said to the lookout he "supposed it was a steamer, and guessed she would take care of herself." The mate then left and went to another part of the vessel to watch some lights to leeward, and paid no further attention to the tug's lights, and from this time the tug's lights were not reported, nor was any watch kept, or notice taken of them whatever, on board the bark, until the lookout saw and reported the tug right under the bows of the bark, and a collision was inevitable. Ordinary care and precaution requires that when a light is once seen in circumstances to involve risk of collision, close watch must be kept of such light until it is safely passed. (See article 20, collision act of Apl. 29, 1864; 1 Parsons on Ship. & Adm., 505,
164 note 3; the Gray Eagle, 9 Wall., 505; the Havre, 1 Ben., 295, 303, 306. See, also, Maria Martin, 12 Wall., 31, 47.)

The lights of the tug, as we have seen, were first seen from the bark when from one and a half to two miles distant. The bark was moving through the water at the rate of nine miles per hour, at which rate she must have been from ten to fourteen minutes reaching the tug after she first made the tug's lights. There could have been no difficulty, by the exercise of the commonest care and precaution on board the bark, in determining that the tug was not in motion, but was slowly drifting right up into the course of the bark, where a collision would be inevitable unless the bark herself did something to avoid it. Neither was there any difficulty in the way of the bark avoiding the collision, and if ordinary care and precaution had been exercised she would no doubt have done so. Because that care and precaution were not exercised on board the bark, the presumption is that she was in fault, and that such fault contributed to the collision. Such presumption not being rebutted she must stand her fair proportion of the loss occasioned by the collision. (Williamson vs. Barrett, 13 How., 108, 9; the Ariadne, 13 Wall., 475, 478, 9.)
165–6 The tug and the bark were therefore both in fault, and the damages sustained by both on account of the collision must be equally divided between them.

Let a decree be entered accordingly, and referring it to a commissioner to ascertain and compute the damages. The question of costs is reserved until the coming of the commissioner's report.

167 THE BARQUE SUNNYSIDE, H. NORTON STRONG, CLAIMANT.

Opinion of Judge Longyear, in district court, on exceptions to commissioner's report, May 27, 1872.

The bark Sunnyside was libelled by John Miner, owner of the steam tug Goodenow, for collision, and a cross-libel was filed against the Goodenow. Both vessels were held in fault, and a division of damages was decreed, and it was referred to a commissioner to ascertain the damages. The commissioner having made his report, the owner of the Sunnyside comes in and excepts to certain items allowed by the commissioner.

In the following opinion only those exceptions will be noticed which were insisted on at the hearing and in the briefs furnished.

Mr. F. H. Canfield & Mr. G. V. N. Lothrop for the exceptions.

Mr. H. B. Brown (Newberry, Pond & Brown) contra.

LONGYEAR, *J.*

First. As to the item for demurrage: 3 months, at $1,500 per month, $4,500.

The owner of the Goodenow was a member of an association called "The Detroit and St. Clair River Towing Association," composed
168 of owners of towing-boats at the port of Detroit. Each boat was put in at an appraised valuation, and each drew its pro-rata share of the net proceeds of the earnings of the whole, according to its valuation. The appraised valuation *of* which the Goodenow was put in was not shown before the commissioner, but it is now shown by a stipulation between proctors to have been $23,000. The evidence shows that for the navigation season of 1869, in which the collision occurred, the net proceeds were eleven per cent. upon the appraised valuation; and it is now agreed that these data constitute the correct basis of damages for demurrage, which agreement is in entire accord with the opinion of the court.

It is also agreed that the season of navigation is comprised of the eight months commencing April 1st and ending November 30th; but advocates are not exactly agreed as to the length of time the Goodenow was necessarily detained on account of the collision. They differ, however, only one-quarter of a month; respondent conceding two months and libellant claiming two and one-quarter months.

The collision occurred June 14th, 1869, and the repairs were completed and the Goodenow commenced running September 30th, 1869, as appears by the proofs. This comprises a period of three and one-half
169 months.

Damages for detention can be allowed only for such time as was necessary to raise the vessel and make the necessary repairs. Nothing can be charged for unnecessary or unexplained delays. This is conceded. John Miner, libellant, testified before the commissioner as follows: "I commenced raising her nearly three weeks after she sunk. There was a delay of nearly a month after she got to Detroit before she commenced repairing." These delays are not explained, and it is conceded that some deduction ought to be made on account of them. I think that the deduction of one month and a half claimed by respondent's advocates is little enough, and that an allowance for two months is liberal.

The exception to the allowance for demurrage is therefore sustained in part, and a deduction from the amount allowed must be made as follows: Eleven per cent. on $23,000 is $2,530 for the season of eight months. This would give $632.50, for two months, as the correct allowance for demurrage. The deduction therefore to be made from the gross allowance made by the commissioner is $3,867.50.

Second. As to the item for John Miner's board and wages, $345.
170 The objection to this item is that it does not appear what he did, or that his services were necessary. Miner was master as well as owner of the Goodenow; and, of course, in his capacity of master, his time was worth whatever it would cost to hire a man in that capacity. The collision, of course, threw him out of employment, and instead of engaging in other employment it appears from the testimony that he actually worked during the time of the detention of the Goodenow in

raising and repairing her. I think, under all the circumstances, he ought to be allowed for his time and board during the necessary detention of the vessel, which, as we have seen, was two months. The rates charged are $100 per month wages, and $15 per month for board. These were allowed by the commissioner, and I think correctly. In fact no objection is made on that account. But as the allowance was made by the commissioner for three months, the exception must be sustained in part, and a deduction of $115 must be made from the amount allowed by the commissioner for the one month's excessive allowance.

Third. As to Campbell and Owen's bill for calking, $1.65. The exception to this item was submitted to on the hearing, and the
171 same is accordingly sustained.

Fourth. As to Joseph Kline's bill, board of hands, $49. The exception is submitted to as to $16 of this item, but is opposed as to the remaining $33. The $33 seem from the proofs to have been in 1869, and for the Goodenow, in connection with her repairs, and I think should be allowed. The exception is therefore sustained as to $16 of this item only, and that amount must be deducted from the amount allowed by the commissioner.

Fifth. As to the items for use of tug Parks, at $900; Sweepstakes, at $150; and Bob Anderson, at $300.

The raising of the Goodenow was let to one Ballentine for $2,500, and these tugs were used by him in that service. The objection to these items is, that these tugs belong to the association, and they having let the entire contract to Ballentine for a fixed sum, they must get the pay of him, or, if they saw fit to donate the use of the tugs to him, they cannot charge the same to the respondent; in other words, that all the respondents are liable for is the amount for which the contract was let.

172 The proof shows that these tugs belonged to the association. Ballentine, the contractor, testifies that he took the job of raising the Goodenow at $2,500, and was to have the services of the tug Park in addition; that he found the services of other tugs necessary, and employed the Sweepstakes and the Bob Anderson of the association; that the association, finding he had lost money, donated to him the services of the two last-named tugs. This testimony settles the matter against the exception, and in favor of the allowance of the commissioner so far as the tug Park is concerned. In regard to the other two, Mr. Livingston, the treasurer of the association, in his testimony states the contract with Ballentine as follows: "A contract was made with J. M. Ballentine to raise her for $2,500, and deliver her at a dock in Detroit, with the understanding that he was to have the use of the tug T. F. Park without charge or expense, and also that he was to have the use incidentally of any of the other tugs of the association which he might require, without charge or expense;" and on his cross-examination he says: "The three tugs and incidental help was furnished to Ballentine without charge on the part of the association; that was part and parcel of the contract;" and this testimony does not appear to be in any man-
173 ner contradicted, unless a contradiction may be inferred from Ballentine's testimony; but I do not think such mere inference sufficient to do away with Livingston's positive statements. In any event, however, I think the allowances were correct. The exception to the allowances for the tugs—Park, $900; Sweepstakes, $150; and Bob Anderson, $300—is overruled.

The other exceptions not noticed in this opinion are overruled, and the commissioner's report, as modified, is confirmed.

From the foregoing it results that the following deductions from the commissioner's report must be made:

1. Demurrage allowed at $632.50, instead of $4,500, as allowed by commissioner; deduction	$3,867 50
2. John Miner's wages & board allowed at $230 instead of $345; deduction	115 00
3. Campbell & Owen's bill for calking disallowed	1 65
4. John Kline's bill for board allowed at $33 instead of $49; deduction	16 00
Total deductions	$4,000 15
Int. Sept. 30, '69, to Apl. 15, '72, date of report	711 70
Total	$4,711 85

One-half this amount, viz, $2,355.92, must be deducted from the amount reported by the commissioner, viz, $7,315.51, as the amount of damages to be paid by respondent, and a final decree must be
174 entered in favor of libellant for the remainder, viz, $4,959.59, with interest from April 15th, 1872, the date of the commissioner's report, and costs of suit. The costs of these exceptions must be paid by libellant.

175 The United States circuit court for the eastern district of Michigan. In admralty.

The Sunnyside and Goodenow. Libel and cross-libel.—Opinion.

EMMMONS, *J.*

The tug Goodenow was lying for a tow in Lake Huron, in the vicinity of the head of St. Clair River, in conformity with a well-known usage. It was about 3 a. m., and although still dark her hull could be seen in time to avoid her had it been known she was without a lookout, and would not herself discover approaching ships so as to perform her duty and move out of the way. All her lights were brightly burning, and she had steam up, ready at any moment to move. A great number of vessels were in the vicinity. She was drifting before the wind, about two miles an hour, with her head to the eastward, so as to desplay to the Sunnyside, which was approaching from the southward, her white and green lights. These were seen by the latter nearly ahead, but, we infer, somewhat over the larboard bow, long before the collision, and by the experienced lookout announced to the master in charge.
176 He came forward, observed them, and remarked that they were on a steamer and that "she was all right." He soon went further aft, to his more common station, midships, where he could walk from side to side in the observance of other lights, and where he could from time to time approach the compass and issue orders at the wheel. The Sunnyside's speed was about nine miles an hour. The lookout observed the continuous bearing of the tug, which indicated that she was not under way and lay nearly in his path. It was not until they approached the immediate vicinity of the tug that the lookout, having had his attention turned in other directions by different lights, discovered that they were in dangerous proximity. He then hastily announced the fact to the master. The latter at once gave orders to starboard, but too late to avoid the disaster, which sank the tug. Upon these facts it's claimed

that the bark is to blame for not starboarding earlier. With some doubt, and after much hesitation, we hold the Sunnyside to be without fault, believing that in the circumstances she was warranted in keeping her course.

In arriving at this conclusion, we are in some degree influenced
177 by the wholly inexcusable and unexceptionally gross character of the Goodenow's fault. The nature of the original libel, and the untruthful and now abandoned proof to support it, we hold as legitimate subjects of consideration in denying a remedy.

In order to appreciate the character of the misrepresentation in the original libel and proofs, it must be borne in mind that it is now conceded that the Sunnyside was at no time over the tug's quarter or in any direction where by any possibility she could be supposed to be there.

Without attempting literal accuracy, substantially the original libel alleged that while the tug was lying as already indicated, the Sunnyside was made over their starboard quarter and so far astern that there would have been a broad berth between them, as she passed, of nearly half a mile. That instead of keeping her course under the rule, she suddenly ported and ran down the Goodenow. No confession of fault was made, but a case stated having in none of its features the most distant resemblance to the facts as they are now conceded at the bar, and contained in the amended libel. The owner of the tug was on board and the libel necessarily framed from his and his officers'
178 statements. This false case was sought to be supported by testimony so inherently absurd and so undeniably untrue that it is unworthy of criticism. In all this there is much which, unexplained, is so highly unconsciencious as to merit censure and essentially affect the right to relief. (The Mabey & Cooper, 14 Wall., 205.) No question as to the circumstances in which the amendment was made has been raised here.

That no person on board the tug saw the Sunnyside until just as the collision occurred is conceded; if they did see them their fault is only the more extraordinary.

The amended libel charges four faults upon the bark: That she had not a proper lookout; that she did not see the tug; that she did not perceive that the tug was not in motion. These imputations are conclusively negatived by the testimony. The fourth is a vague generally giving no enlightenment to respondent, and is such as we would, upon exception, hold not to be the subject of proof.

The officer in charge of the bark, having once observed the light, had full authority to act upon the assumption that the steamer would avoid him. We hold that if a light is announced to an officer in charge of a vessel, obliged under the rules to keep her course, and, from
179 full observation, the unambiguous, *ap*apparent conditions in reference to wind, atmosphere, course, distance, and character of the vessel, all indicate absolute safety if the law of the road is complied with, he may leave the future watching of such a light to an experienced lookout. It will not be a fault that he does not himself remain with the latter, and participate in his observation. He may return to his post further aft, to his general duties in the ship, and especially if other lights are off abeam and over the quarters, give his attention to them, and in all cases frequently to his compass and his own course.

The application of the principle to ships whose duty it is to avoid others requires only a more close criticism of the circumstances and more frequently demands longer and continuous observation by the master. If from such observation any circumstances known, or which with ordinary

diligence might be known, indicate a departure from the rules by the approaching ship, or would suggest danger of collision from any cause to an intelligent seamen, the duty of careful and continuous watchfulness is imposed upon the master. He would have no right in such a case to leave to the lookout the difficult duty of deciding when,
180 on account of increasing hazard, he should again announce the light. When in these latter circumstances the officer has exercised his best judgment and kept his course, or, waiting until the peril was great, has departed from the general rule, the court should not reverse his judgment, unless the error has been gross and unpardonable. It is not the duty of a lookout to re-announce a light, unless some new conditions occur which an intelligent officer of the deck would not anticipate from the first observation made, and in reference to which it is in some degree probable a new order would be given.

These general principles we think will receive a ready common assent. We apply them here as follows: That the master performed his duty by remaining aft, where he could not see the danger, we have already sufficiently said. We think it equally clear that the lookout did his duty. An unnecessary argument was made to show that he might from her continuous bearing perceive that the tug was at rest. This seaman frankly swears that he did so perceive it, and the fact is too apparent for discussion. But it indicated nothing unusual, and imposed no duty on the lookout of re-announcement, certainly when not at a distance, because the custom is as common as the trips of the sail
181 craft for which they lie in wait. Nor was a near approach with the same condition any more alarming. It is a common practice for these vessels to wait before they move for close proximity of those which approach them. As a class they are small vessels, with powerful engines, and both started and backed with the utmost rapidity. From the nature of their avocation they acquire an extraordinary dexterity in avoiding vessels close aboard, and consequently, beyond all others, risk nearness of approach. If this one had not the characteristics of her class it but adds another reason why, assuming their attitude and proclaiming that she had, relief should be denied. Out of many thousands of instances where similar vessels have lain in the same way, not one in the whole history of navigation is known to have failed in the performance of her duty. The lookout of the bark had a right, therefore, to repose not only upon the statutes of the country, but upon the peculiar power and long practice of this class of ships to perform in just their circumstances the duty which it imposes. It was in the night, when no eye can measure the distance to a light or
182 the hull of a ship of unknown size so as to discover the difference between two, four, and six hundred feet. The tug was already moving two miles an hour before the wind. The bark was going nine, with her bows alternately elevated and depressed, and swayed to the right and left as she rose and fell with the waves. These conditions rendered an immediate discovery of the precise moment when the tug, by a few turns of her wheel, would move slightly ahead or astern, as she should elect, utterly impossible. If life depended upon it, it could not be done. She would have to pass several times the distance necessary to avoid the bark before her movement could be perceived by the lookout. He, too, was engaged in watching other lights in entire confidence that this one would move out of his way, and, therefore, would not, on the most familiar principles, give it any particular attention. That he would from time to time see it is certain. because it lay in plain sight before him, and he concedes that he did observe its continu-

ous bearing. But it is equally certain, if he was actuated by the motives of ordinary men, he would not, as he states, particularly
183 notice it until some new and extraordinary predicaments suggested that it was not likely to obey the laws which so many hundreds before had obeyed in like situations. Add to these conditions the rule of law that if the bark changed her course at all in advance of real danger, that she would be condemned for the fault, and we have presented predicaments in which it seems to us little less than a cruel misapplication of rules to hold the owner liable, because the lookout did not decide the precise moment at which he crossed the line of safety. We asked in vain from the learned and experienced counsel in this case a diagram designating in time and distance the point at which the lookout should have re-announced the light. None such has been furnished. We apprehend that it would be difficult to draw one which would stand the criticism of an expert.

In a case where the fault of the libellant is excessively gross, where the bark has kept her course in accordance with the law, when her officers and lookout are proved to be of the very highest character, and when, to say the least, their conduct has been all which in ninety-nine cases in the hundred can be secured, we should deem it most impolitic for the safety of navigation, a discouragement to the performance of
184 duty by good seamen, to set up in court, for the benefit of those who have outrageously violated the law, a rule of criticism which would condemn the respondent's ship. In exceptional circumstances, and under the stimulus of apprehended danger, "sleepless vigilance," rightfully in such cases demanded, is possible. With our present faculties it cannot be long sustained, nor do the ordinary exigencies of commerce demand it. When the facts presented not only fail to excite suspicion of peril, but when viewed in connection with legal rules authorize entire confidence that all is safe, ordinary care is all which can be continuously exercised, and all which the law requires.

We would like to have grouped the decisions which sustain more particularly the various propositions involved in the preceding disposition of this case. Again, compelled to work in an unusual mode from failing sight, and with many undecided cases demanding attention, we can do no better than to refer to judgments in the order in which they have been examined. In our selections we can go but little beyond the exceptionally full and thorough brief of counsel.

The following cases show our judgment would be sanctioned by the English admiralty courts: The Test, 5 Eng. Adm., 5 Notes of Cases, 279, Dr. Lushington says, "I cannot conceive that anything would
185 be more likely to lead to mischievous consequences than to suppose that a vessel whose duty it is to keep her course should anticipate that another vessel will not give way, and so give way herself. The consequence would be that there would be no certainty." "The certainty which results from adhesion to general rules is, in my opinion, absolutely essential to the safety of navigation." (The George, 5 Eng. Adm., 5 Notes of Cases, 371.) This is emphatically repeated by the same judge. (The Superior, 5 Eng. Adm., 6 Notes of Cases, 607.) He says the proof must be entirely clear, showing the necessity for the deviation before it can be even justified. It is a different thing to hold that a neglect to do so is a fault. And see, equally pointed, a case quite beyond the requirements of the Sunnyside. (The Vivid, 5 Eng. Adm., 7 Notes of Cases, 127. The Immagauda Sara Clasina, 5 Eng. Adm., 7 Notes of Cases, 579.) A vessel whose duty it was to keep her course did not deviate until she had twice hailed the other, and at last in alarm did so,

was condemned in the entire damage. It is an extreme case, and goes far beyond what it is needful now to argue. We would hold the master blameless if the approaching ship neglects his duty so long as to
186 produce alarm in an experienced sailor. And see a more recent enforcement of the same rule. (Law Rep., the Gitana and Esk, 2 Adm., 350.) The Esk's lights indicated her at anchor. Minute observations might have discovered she was in motion, but the Gitana was held faultless for full reliance on the lights.

The decisions of our own courts are equally pointed in the same direction. The Clement, 2 Curtis, 363: A ship, conceding her own fault, asked a decree for division against another which was entitled to keep her course. It had been plausibly argued, as in this case, that as she approached close to, it was entirely manifest a movement on her part would have prevented the disaster. At page 368 Judge Curtis says: "Upon the rule of navigation applicable to such cases, he was not only in the right in acting upon the assumption that the brig would be so steered as to keep out of his way, but he was bound to act on that assumption and keep his course, unless he saw that there would be no probable chance of collision if he disregarded the rule." The Ariadne, 7 Blatch., 213: A brig having an imperfect starboard light was sunk in the night by a steamer. It was sought to sustain the libel on the ground that by extraordinary vigilance the brig might have been sooner seen. Judge
187 Woodruff, affirming the decree dismissing the libel, at page 213, says: "But vessels have a right to assume that other vessels, if in their neighborhood, are acting in obedience to the statute regulations, and where the negligence of the sailing-vessel and her failure to comply with the statute requiring her to bear a light which can be seen at a distance of two miles have led the steamer into danger of collision, it is not for the sailing-vessel to insist that by more than usual vigilance she might nevertheless have been discovered at a few yards' greater distance, and to claim contribution on that ground." This case is reversed by the Supreme Court in 13 Wall., 475, but upon grounds which do not in the least affect the principle for which we quote it. That court, taking an entirely different view of the facts, declared the steamer guilty of gross fault; that "for all the purposes of the case there might as well have been no lookout on the steamer." The expressions in reference to "sleepless vigilance" are carefully confined to the crowded thoroughfare in which the collision occurred, and were applied to a ship upon which was cast the duty of avoidance. They notice, too, that, although the light of the bark was dim, she could have been seen a quarter of a mile, if the lookout had done his duty. The judgment in no way qualifies the rule laid down by the circuit and district judges, that the
188 gross fault of a libellant cannot impose exceptional vigilance upon another. This is well-settled law in the Supreme Court. The Comet, 9 Blatch., 323, Judge Woodruff says that where a party seeks a recovery after confessing a fault on his part, he must be held to the clearest proof of wrong on the part of his adversary. It is not enough to have it in doubt. In Saltonstal *vs.* Stockton, *Taney*, 21, Chief Justice Taney at common law lays down the following principle, which is equally applicable in a court of admiralty: "If a man unlawfully places another in a situation which compels him to undergo one of two hazards, and forces him to choose upon the instant between them, he necessarily gives him the right of selection, and must be responsible for the consequences, although it may turn out that the most fortunate alternative was not adopted." The Scotia, 7 Blatch., 308: The Berkshire, with illegal lights, led the Scotia to suppose that it was a steamer at

so great a distance that her colored lights were hid by the convexity of the ocean. She was in fact but a few rods off. In a judgment which, on account of the magnitude of the values involved, was the result of more than ordinary examination, Judge Woodruff, affirming on appeal what Judge Blatchford had ruled in the district court, at page 338, said: "It was
189 night, the distance of the Berkshire could not at that instant be known. If the Scotia attempted to go to port, it was not at all improbable that she would meet the ship while in the act of turning, while by turning to the starboard there was a like uncertainty. Her officers must choose. They did exercise their judgment in good faith, and yet the collision ensued." Attention is called to the fact that lights in reality within a few rods were supposed four miles off upon the masts of a steamer whose colored lights were below the line of vision over the water. Here the Sunnyside is asked to decide within two or three hundred feet the precise distance of the Goodenow. This case has been affirmed by the Supreme Court, although not yet in the reports. The William Young, Olcott, 41: A sailing-vessel, in fear of a collision, having changed her course to avoid it, was injured by a steamer. Judge Betts says: "Sailing-vessels cannot justify a departing from their course on a probability of encountering an approaching steamer, unless she is crowding so much on the track as to create imminent danger of collision." The R. B. Forbes, 1 Sprague, 328: The libellant's vessel saw a steamer more than a mile off; she might easily have avoided her by a slight movement; but as it was her duty to keep her
190 course, Judge Sprague decreed for the whole damage, upon the ground that she had a right up to the last moment to suppose the steamer would avoid her. He adds, it would have been a fault for her to have changed her course. The America, 9 Wall., 630; S. C., 6 Blatch, 190: It was the duty of the America to avoid the Corsica. In attempting to cross her bows at a late period, descovering it was too late to do so, she stopped and backed. The Corsica, on the supposition that she was going to carry out the attempt, starboarded. This would have been entirely safe, but for the unexpected backward movement of the America. Although the Corsica was misled into this movement, the district, circuit, and Supreme Courts all condemned her in the entire damage of thirty-three thousand dollars. She did not adhere to the rule and keep her course. The Coyne, 4 Wall., 512: When a vessel at the last moment, in great peril, altered her course, the court, in holding it justifiable in the circumstances, prescribes rules clearly showing the Sunnyside was right in holding her course, even if it would not have been a fault to do otherwise.

It is in no disregard of the familiar rule that the admiralty, if it suffers recovery at all where there is mutual fault, equally divides
191 the damages, that we say that when there is gross and criminal departure from well-settled rules, and an absence of all common care on the part of the libellant, he should not be entitled to recover, even although he succeeds in proving a slight fault against his adversary. The Comet, 9 Blatch., 329: Judge Woodruff examines the question of fault on the one side in the light of that shown upon the other. Numerous judgments pursue the same course. It may perhaps resolve itself into the simple truism, that the more gross and improbable is the fault on the one side, the less is the duty of observation and its anticipation on the other.

An extraordinary criticism is made in this case. Complaint is made that a lookout on a vessel entitled to keep her course, with a light before him which a seaman of common prudence would take for granted,

would get out of the way, temporarily took his eyes from it to watch other points of the horizon, along which were numerous lights. Wholly unreasonable as is such an objection when coming from the mouths of those who put them forth to protect themselves from the consequences of their own wrongs, they are, nevertheless, not novel, and have been frequently answered by judges of the highest character. The Europa,
192 Browning and Lushington, 89; 2 E. L. and Eq. 557: The privy council, affirming the decision of the high court of admiralty, dispose of such a criticism in favor of the bark. The Charles Bartlett being close hauled and bound to keep her course, and the steamer which sunk her having been found in fault, it was urged that the sail-vessel should contribute to the damages, because, among other imputed faults, it was conceded that the lookout, just before the collision, had his attention abstracted from the steamer by turning to observe some workmen engaged in coppering the rail. Their lordships say: "We can pay no attention to that argument; his business as lookout was to walk with his eyes towards the horizon, but that does not mean that he is not to turn his eyes off to watch what a man is doing. All these expressions 'lookout' are to be taken in the common sense. He might do that and look after the man coppering the rail." They say, as the barque was entitled to keep her course, the absence of a lookout was less important. Answering the objection that the barque might have seen the steamer sooner, they add: "Now we think, in reference to that circumstance, that she was keeping her course was very important, because a ship keeping her course is only bound to go on and keep her course, not anticipat-
193 ing & watching that other persons are coming. If she had heard something was coming she would have been entitled to consider that it would come so as not to do her damage." A different rule, of course, would apply when perceived irregularities indicated danger, and especially to a vessel bound to avoid another.

When that high degree of watchfulness, necessary only in circumstances of danger, is in argument required of those who are entitled to their way, upon the ground that unexpected irregularities may attend the movements of the approaching ship, the appropriate answer is that given by Judge Woodruff in the Scotia, Blatch., where substantially he says such a position assumes what is not to be assumed, that irregularities will occur, or that officers, without evidence that they are probable, are bound to presume they will happen. Not in reference to a vessel having a right to keep her course, but to those which are bound to keep out of the way, and when a higher duty is imposed than that demanded of the Sunnyside, the Supreme Court, in the Grace Girdler, 7 Wall., 203, lays down the following reasonable rule: "The highest degree of caution that can be used is not required. It is enough
194 that it is reasonable under the circumstances, such as is usual in similar cases and has been found by long experience to be sufficient to answer the end in view, the safety of life and property." The remarks in Williamson vs. Barett, 13 How., 101, are peculiarly applicable in cases like this. The Supreme Court says it is by no means enough to show that a particular act or movement would prevent a collision; it must further appear it is a legal duty to make it. In ninety-nine cases in a hundred vessels bound to keep their course might save collision by deviation, but it is not their legal duty or right to do so.

Equally stringent in the application and unambiguous in expressing the rule in manifold application, are The Continental, by Judge Woodruff, 8 Blatch., 3; The Eastern State, by Judge Curtis, 2 Curtis, 144; The Favorite, 1 How., 89, 8 Blatch., 539; Taylor vs. Howard, Taney's, 444;

The City of Paris, 9 Wall., 635. In the City of New York, 1 Cliff., 75, Judge Clifford says: "The vessel whose duty it is to keep her course should do so as if there were no danger." And in The Governor, 1 Cliff., 96, he adds that these suggestions, that a ship bound to keep her way might by deviation avoid the collision, are entitled to but little weight.

See also The Catherine, 2 Hogg., 145; The Fashion, Newberry,
195 157; The Lyon, Sprague 44; Pars. Adm., 529, and cases cited. The Carroll, 8 Wall., 305; The Johnson, 9 Wall., 146; Crockett vs. Newton, 18 How., 583; The Steam Co. vs. Rumble, 21 How., 385; see also The Free State, eastern district of Michigan, 1873, decided by this court, in which the general principal, authorizing full confidence that the rules of navigation will be adhered to, is announced, and the leading judgments considered.

A full consideration of the books cited by the libellants is impossible. None of them, save one purporting to be a correct manuscript report of a decision by Judge Clifford, have any tendency at variance with our judgment. We doubt whether it is fully before us. The Gray Eagle, 9 Wall., 505, is cited by the libellants; the case bears no analogy to this. The court say the Gray Eagle was grossly in fault for not perceiving that a light, which must have crossed from the larboard to the starboard bow, was in motion and not at anchor. The remark that the master should have watched the light we should agree with in the circumstances of that case. The Scotland, 1 Ben., 295, a vessel whose duty it was to keep out of the way, was guilty of manifest irregularities, in such ample time before the collision, that, had they been known
196 to the officer on the other ship, ordinary prudence would have demanded a deviation. The lookout signally failed to do his duty. The case is but a common illustration of principles we fully concede. With some of the arguments in the opinion, if, as we much doubt, it is intended to sustain the inferences which counsel sought to draw from it, we should not agree. The Vanderbilt, Abb., 361; The Hope, 1 Wm. Rob., 157, are like cases. 1 Pars. Adm., 590, and notes, refers to the leading cases holding that a rule of navigation should not be stubbornly adhered to. He remarks that the Oregon, 18 How., 570, Newton vs. Crockett, 18 How., 591, take a somewhat different view. If it is supposed that tribunal has decided a rule of navigation may be stubbornly adhered to, we do not so understand them, and certainly proceed in no such notion now. If there be any difference between the English and American rulings upon this subject, the former are more rigid in insisting upon adhesion to rules of navigation. We think the judgment referred to and the rules best for the safety of navigation establish the right of the Sunnyside in the circumstances which were presented to the lookout to keep her course up to the point when collision be-
197 came inevitable. She then did all in her power to avoid it. That there was no fault in the master for returning to his post, or in the lookout, standing on the forecastle of his heaving ship, in the night, with no guide object between him and the light, that he did not discover the difference between a movement of two miles an hour and five, or in distance between six hundred feet and two. Carelessness on the part of the libellant, which, if life had been lost, was undeniably criminal, can cast no such extraordinary duty upon the approaching ship.

Decree for the cross-libellant.

Messrs. W. A. Moore & H. B. Brown for the tug.

Messrs. G. V. N. Lothrop & F. H. Canfield for the bark.

Filed in clerk's office April 2d, 1873.

A. MANDELL, *Clk.*

SUPREME COURT

OF THE

UNITED STATES.

OCTOBER TERM, A. D. 1874.

No. 297.

JOHN MINER,
Libellant and Appellant.
vs.
THE BARK "SUNNYSIDE,"
THOMAS PITTS,
Executor, Claimant and Appellee.

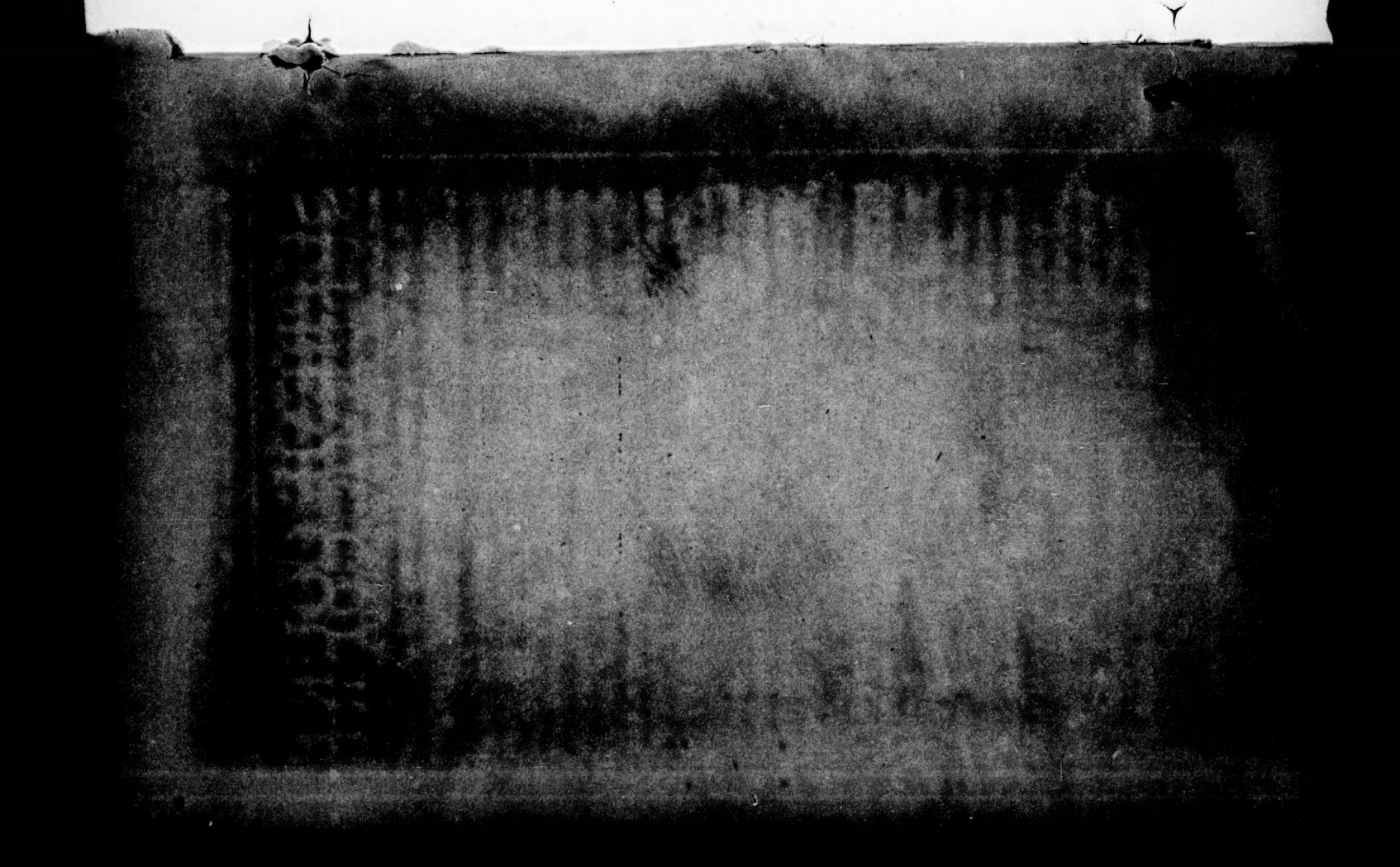
APPEAL FROM THE CIRCUIT COURT OF THE U. S.

For the Eastern District of Michigan.

IN ADMIRALTY.

BRIEF FOR LIBELLANT AND APPELLANT.

DETROIT.
O. S. GULLEY'S STEAM PRESSES, 10, 12 & 14 LARNED STREET, EAST.
1875.



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IN ADMIRALTY.

Brief for Libellant and Appellant

STATEMENT OF CASE.

This is an action *in rem* for a collision between the tug "Wm. Goodnow" and the bark "Sunnyside," which occurred about 3 o'clock in the morning of June 13th, 1869, upon Lake Huron.

The facts are practically undisputed, and are substantially as follows:

That the tug lay with her bright and colored lights burning waiting for a tow, from three to five miles off Lexington, and headed about E. by N. half N.

That the night was clear and fine, and the morning had so far dawned that she could be seen without lights from one and a half to two miles distant by one looking in a northeasterly direction.

The bark was coming up the lake with a brisk wind from the S. S. W., and was pursuing a course about N. half W. at a speed of nine knots an hour.

The bark struck the tug while lying motionless nearly at right angles, on her starboard side, near the pilot house, sinking her within fifteen minutes thereafter.

The libel alleged that during the night a large number of vessels showing their green lights passed up the lake between said tug and the Michigan shore; that the bark Sunnyside was descried from the tug coming up the lake, apparently in the track of the vessels which had preceded her, showing a green light, and bearing from two to three points off the starboard quarter of said tug; that when she had approached to within about one hundred rods of said tug, showing enough of her broadside to indicate that, unless she changed her course, she would pass some distance astern of said tug, she suddenly kept off and steered for the tug, and very soon thereafter struck her on the starboard side nearly abreast of her pilot house.

The answer and crosslibel charge that the bark was passing up the lake heading N. half W. with all sail set, with a stiff breeze from the S. W., and with her proper lights and officers properly stationed and watch forward; that the bright and green lights of said tug were discovered a little on the port bow, indicating a steamboat standiug to the Eastward across the bows of said bark; that said bark was kept steadily on her course until the collision was inevitable when her helm was ordered hard up to ease the blow, but before said order could take effect the bark and tug collided, the latter being struck on her starboard side, forward of the pilot house. Fol. 12 and 14.

Upon the trial the witnesses upon the tug and bark failed to agree as to the relative positions of the two vessels as the bark neared the tug.

Dennis Swartout, mate of the tug, swore, folios 31 and 32, that he saw the Sunnyside coming up the lake showing her green light, until she got up within a hundred rods or thereabouts; that he again looked at her, saw that she was going all clear of the tug; that he took his eyes off of her again to look at other vessels for a moment, and when he again turned to look at her he saw her jibboom coming over the tug just forward of the pilot house.

On the contrary, the lookout and mate of the bark swore that they made the tug half a point on their port bow, exhibiting a bright and green light, and they, as well as the wheelsman, swore that the bark kept steadily on her course until the tug was directly under their bows, when the helm was ordered hard aport.

It was conceded upon the argument of the case that the tug was in fault for not keeping out of the way of the bark, but it was insisted that, granting that there was a preponderance of evidence in favor of the theory that the bark did not change her course until the collision, there was proof from her own testimony of gross fault on her part, and that she ought to be condemned in a moiety of the damage.

The District Judge, in his opinion, took the same view of the case—allowed the libel to be amended, folio 7, disposed of the case upon the merits as presented and submitted at the hearing, folio 160, and condemned both vessels for the collision. On May 27th, 1872, a final decree was entered in favor of the libellant, and formal leave was granted him to amend his libel to correspond with the facts found by the Court, folio 133; and thereupon the libel was amended by adding to the fourth article the following allegation.

"That said tug was then lying motionless upon the water and out of the track of vessels going up and down the lake; that, as your libellant is informed and believes no proper lookout was kept upon the said bark, and that the said collision was occasioned by the failure of the officers and crew of

said bark to see said tug and to discover she was not in motion, and to take steps to avoid her."

The question then to be determined is simply this: A bark sailing up the lake with a free wind sees a tug lying nearly directly in her path. Has she a right to proceed on her course, paying no further attention to the tug, treating her as an obstruction to navigation, and without attempting to hail her or change her course, run her down when a few seconds observation would have shown that the tug was motionless.

ASSIGNMENTS OF ERROR.

We claim that the Circuit Court erred in the following particulars:

1. In reversing the decree of the District Court; dismissing the original libel and rendering a decree in favor of the cross-libellants.
2. In holding the bark free from fault.
3. In holding that the want of a proper lookout upon the bark did not contribute to the collision, and holding that the officer in charge of the bark, having once observed the light, had full authority to act upon the assumption that the steamer would avoid him.

I.

THE BARK WAS IN FAULT FOR THE WANT OF A PROPER LOOKOUT.

This fault is clearly apparent from her own testimony. The facts are substantially—that the lookout made the tug's green and bright lights about half a point to a point over his port bow, apparently heading to the eastward; that he reported her to the officer of the deck who went forward, saw the tug apparently from one and a half to two miles distant; told the lookout he supposed it was a steamer, and guessed she would take care of herself; then went aft, paid no further attention to her and looked for other lights. The lookout also paid no further attention to her until he saw her close under

his jibboom, when he hastily reported her to the mate, who ordered the wheel hard aport, but before the order could be executed the bark struck the tug and sank her within a few minutes.

The testimony upon this is so brief we shall quote it literally.

Peter Bell, mate, says:

Folio 50. "We made the tug's green light and her forward bright light. When I saw those two lights I saw she was a steamboat of some kind, and she was apparently heading to the eastward. I made her lights from half a point to one point (not much more than half a point) over our port bow. The lookout man sung out to me and I ran forward and saw her. Our lookout was Joseph Fratus. He was stationed on the top gallant forecastle, the forward part of the vessel. * * * * * * *

When the lookout first called my attention to her the tug was one and a half or two miles distant. * * * I gave no order to the wheelsman; told lookout I supposed it was a steamer, and guessed she would take care of herself. I then went aft and looked at a couple of red lights I made over her starboard beam. * * * There were also several other lights further off. At the same time I was looking out expecting to see this tug's light to leeward, as I supposed she was standing to the eastward (the way she was heading when I saw her lights), and would cross our coarse. * * * The next I heard of the tug was when the lookout man sung out to me that the light was close under the bow. I shouted to the man at the wheel to "hard up," that is to put his wheel hard to port. I shouted as I was running, and I could see him in the motion of heaving his wheel. Then, as I ran up the three steps leading on to the forecastle, and got on to the forecastle, the vessel struck. * * * There was no change in the vessel's course from the time I first saw the light until the collision.

Folio 52. When I gave the order to hard up, the vessel had then no time to swing off. * * * I was told by the captain that I formerly served with that if a steamboat was in my way to run right over them. * * * It was my impression that she was under headway. There was no way for me to tell she was not under headway.

CROSS-EXAMINATION.

Folio 53. If she had been moving I would not have noticed it by looking at her lights. I would have noticed it in crossing our bows; could have noticed it in crossing our jibboom. I could have noticed

if she was moving in that way, but did not stay there long enough. I looked at her long enough to see that she was a steamboat, and that was all. * * * *

Folio 54. *Ques.*—How long would it take you to tell she was in motion?

Ans.—Probably three, or four, or five minutes. I would have to catch her lights in some object and see she was in motion.

Ques.—What object could you fetch her in in a dark night?

Ans.—We would have to wait until you could get something—the vessel's jibboom, or for a star to come out close to the horizon.

Joseph Fratus, lookout.

Folio 56. When I first saw the tug I made her green light and bright light; made them over the port bow one half point. I reported the light to Mr. Bell. He came forwarded and looked at it. He remained with me three to five minutes. The vessel showing the green and bright light appeared to be headiag to the eastward. I could not tell if she was in motion. Our vessel continued straight on her course from that time until the collision.

CROSS-EXAMINATON.

Folio 57. The jibsails did not interfere at all with my keeping a lookout ahead. * * *

Ques.—The mate told you, didn't he, that you need not mind her, because she was a tug.

Ans.—He said she was a steamer going to the eastward, and she was all right. I looked for other vessels and paid no further attention to her until I saw her close under our jibboom.

In commenting on this testimony the District Judge observes, folio 162: The duty of a steam vessel to keep out of the way of a sailing vessel, and of the latter to keep her course, does not excuse the sailing vessel from the observation of ordinary care in her navigation, nor from the use of such means as lay in her power to avoid a collision in case of immediate danger, even though that danger may have been made imminent by a non-observance of duty on the part of the steam vessel.

Folio 164. The lights of the tug, as we have seen, were first seen from the bark when from one and a half to two miles distant. The bark was moving through the water at the rate of nine miles an hour, at which rate she would have been from ten to fourteen minutes reaching the tug after she first made the tug's lights. There could have been no difficulty,

by the exercise of the commonest care and precaution on board the bark, in determining that the tug was not in motion, but was slowly drifting right up into the course of the bark where a collision would be inevitable, unless the bark did something herself to avoid it. Neither was there any difficulty in the way of the bark avoiding a collision, and if ordinary care and precaution had been exercised she would, no doubt, have done so.

The Circuit Judge, however, held that the conduct of the bark was faultless, reversed the decree of the District Court and dismissed the libel.

It is hardly necessary to cite authorities to the proposition that the want of a proper lookout is a fault of the grossest description, and in case of doubt every presumption is in favor of the proposition that it contributed to the collision.

There must not only be a proper lookout, but he must actually perform his duty.

The Vianna Swabey.

Though a sailing vessel meeting a steamer is bound in general to keep her course, she does not necessarily discharge her whole duty by so doing. She is bonnd to watch a steamer's lights as much as those of a sailing vessel and prevent a collision if she can. A tug may be disabled or unable to move, as in the present case, or special circumstances may exist requiring a departure from the general rule. Under the 19th article of sailing rules a vessel is bound to provide against such emergencies. This article reads as follows:

"In obeying and construeing these rules, due regard must "be had to all dangers of navigation, and due regard must "also be had to any special circumstances which may exist in "any particular case rendering a departure from the above "rules necessary in order to avoid immediate danger."

By article 20, nothing can exonerate a vessel from the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case.

As the District Judge has well observed, these rules are made to prevent collisions. It will not do to say that because a tug is in fault for lying motionless upon the water, that a sailing vessel is thereby licensed to run her down. The whole theory of claimant's case is based upon the doctrine that nothing more is necessary for a sailing vessel than a dogged adherence to her course. In his answer to the cross libel, he speaks of the tug as merely "an obstruction to navigation," and the chief officer of the bark says practically in his testimony that he was told by a captain with whom he formerly served that if a steamboat was in his way to run right over her, evidently looking upon this as a highly commendable deed. A stronger case can hardly be put of special circumstances requiring a departure from the general rules of navigation. The lookout of a sailing vessel going up the lake with a fair wind observes a green and bright light of a tug very nearly dead ahead. The direction of the wind was such that if the tug was drifting she must be drifting directly across his course. Two or three minutes careful observation of these lights would have shown that the tug was motionless, and that some unusual precaution must be taken to clear her. The exhibition of a torch, or even a hail from the lookout would have been sufficient. If these precautions had proved ineffectual a slight turn of the wheel to starboard would have sent her astern of the tug without the possibility of danger to the bark. The bark was sailing with a fair wind and was as easily managed as a steamer. Starboarding but half a point would have sent her far astern of the tug. She might have come about and luffed up into the wind. The tug was seen at a distance that afforded her every opportunity of avoiding a collision.

The following cases clearly establish the proposition insisted upon here. That the fault of one vessel, however gross, does not justify an entire absence of care on the part of another, or authorize her to treat her as a mere obstruction to navigation.

The Cray Eagle; 9 Wall., 505.

Collision between schooners Perseverance and Gray Eagle in the Straits of Mackinaw. The former had lost her lights in a storm, and was sailing with a white light on a course E. by S. The light was supposed by the Gray Eagle to have been a light on shore or upon a vessel at anchor, and was not discovered to be a vessel's light in motion until the Perseverance got within three lengths of the Gray Eagle, when the wheel was ordered hard up. The Court held that the admission that the light was not discovered to be in motion was evidence of great negligence on the part of those upon the Gray Eagle, although the courses of the two vessels was only at an angle of about two points, and condemned the Gray Eagle. But this Court has frequently held that the omission to exhibit the proper light, though a fault which undoubtedly puts a vessel *prima facie* in the wrong, does not exempt other vessels from the consequences of negligence on their part.

This opinion applies with peculiar force to the case at bar. The mate and look-out both testify that they observed the green and white light of the tug, and made up their minds that she was passing to the eastward, or directly across the course of the bark. The mate says he was expecting every minute to see her pass to leeward, but took no pains to ascertain why she did not do so. Had this light been observed but for a few seconds, the fact that it did not move would have been apparent, and would have shown the necessity of their exhibiting a signal to the tug, or of taking precautions to avoid her.

Chamberlain vs. Ward; 21 How., 548.

This case arose out of a disastrous collision between the propeller Ogdensburg and steamer Atlantic upon Lake Erie. It was insisted by the steamer that the owners of the propeller, inasmuch as she did not show the proper signal lights, were liable for the whole damages. As to this claim the Court remarks, page 567:

"Failure to comply with the regulation, in case a collision occurs, is declared to be a fault, and the offending party is made responsible for all loss and damage resulting from the neglect; but it is not declared by that section or by any other rule of Admiralty law in the jurisprudence of the United States that the neglect to show signal lights on the part of one

vessel, discharges the other, as they approach, from the obligation to adopt all reasonable and practicable precautions to prevent a collision. And if one has such lights and the other has not, yet if the one having such lights actually sees the other veesel as she approaches, in ample season to avoid a collision, and neglects to take any proper precautions to prevent it, and it ensues, it cannot be said in such case that all the loss or damage resulted from the neglect of the vessel without such lights, as the collision might have been prevented, and but for the negligence or perverseness of those in charge of the vessel showing lights, would never have occurred."

The A. Denike.

This is an unreported case decided in the Circuit Court for the District of Mass., by Mr. Justice Clifford. It was a collision between the brig Clara F. Webster and the schooner Denike, off Nanset[t] Light, Cape Cod, about half past three o'clock in the morning, by which the brig was sunk. The Court found that the two vessels were not meeting end on within the meaning of the 11th article, as contended by the libellants, and that the brig was in fault, as it was her duty to keep out of the way if there was danger of collision, and if not she had no right to attempt to cross the bows of the schooner at the risk of collision. "When one of two ships is required to keep out of the way, the other is required, as a co-relative duty, to keep her course, subject to certain reasonable and necessary qualifications. Special circumstrnces may exist in a particular case rendering a departure from the rule necessary in order to avoid immediate danger, and the act of Congress, among other things, expressly provides that nothing in these rules shall exonerate any ship from the consequences of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

"Respondent's own testimony shows beyond controversy that the pilot, when notified by the look-out that there was a light ahead, went forward and looked at it several minutes, and then went aft, saying the approaching vessel was going all right. Beyond question he ought to have observed that there was a necessity for precaution, as the lookout does not pretend that the brig would have passed to leeward more than her length if she had kept her course. Distance of the vessels apart when the brig ported her helm was at least 159 yards, and it was not doubted that if the pilot had continued to watch her course, as he should have done, the collision would have been prevented. Instead of doing so, however, he turned round and walked aft, virtually leaving the vessel in

charge of the lookout. He gave the order 'hard up,' but it was too " late to prevent the disaster. Excuse offered for the pilot is that he " had a right to keep his course, but rules of navigation were framed " and designed to save life and property, and not for the purpose of " promoting collisions. Such were the views of the Supreme Court " long prior to the enactment of the steering and sailing rules, which " expressly provide that nothing therein contained shall exonerate " any ship from the consequences of the neglect of any precaution " required by the ordinary practice of seamen or by the special cir- " cumstances of the case.

" Common justice forbids that a party who voluntarily casts him- " self upon an obstruction shall be entiled to damages, and it is " equally plain that a party inflicting injury upon another ought not " to be permitted to defend himself successfully against the act be- " cause the injured party committed the first error, if he had reason- " able notice of the error, and ample means and seasonable opportu- " nity to avoid inflicting any such injury.

" Experienced as the pilot was, he ought to have prevented the " collision by porting the helm of the schooner. Her lookout saw " the brig before the error was committed and was looking directly " at her when she ported her helm and attempted to cross the line " of the schooner's course, and if the pilot had watched her course for " a moment longer he would have had the same seasonable knowl- " edge as was acquired by the lookout. Vigilance is required of those " in charge of both vessels, and when there is negligence on both " sides both must share the consequences. Best judgment I can form " in this case is, that there was fault on both sides, and the damages " must be divided."

See also N. Y. Steamship Co. vs. Rumball, 21 How., 372.

The Havre, 1 Ben., 295.

This was a collision between a bark and a ship off Sandy Hook. Both were close hauled, the bark being on her port tack. The Court held that it was the duty of the bark, having the wind on her port side, to keep out of the way of the ship which was crossing her track so as to involve risk of collision.

But it seems the lookout of the ship left his post after reporting a light, and the pilot in charge was also remiss in going to look out for other vessels. The men upon the ship saw the bark for fifteen minutes before the collision, watched her approach with more or less care for more than two miles, and without the slighest change in her course, struck the bark a few feet forward of her stem, when a slight change in her wheel to starboard would have enabled her to clear the bark.

The Court held the ship should have done this, although she was entitled to the right of way. It is a rule of prudence and sound sense often reiterated in judicial actions that every vessel is bound to avoid a collision if she can. The fault of one approaching vessel does not authorize the other to run her down, because she happens, even through her own folly, to lie in her wake. I am well aware that where the law charges one vessel with the duty of keeping out of the way of another, the corresponding duty of the other to keep her course is to be vigorously enforced. But it is to be enforced with intelligence and the interest of safety, and not to be enforced or even permitted, blindly, to destructive ends.

See also the Ariadna, 13 Wall., 475, where judgement of both lower courts were reversed by this court, although the injured vessel was carrying no lights at all.

The Hope, 1 W. Rob, 154.

The Court remarks : "It has also been further urged in the argument that if it was in the power of the Nelson to have avoided a collision by giving way, she was bound to have done so, notwithstanding the rule of navigation that has been referred to. As a proposition of law I admit it to be true that no vessel should unnecessarily incur probability of collision by a pertinacious adherence to the strict rule of navigation. If a steam vessel, for instance, should be nearing another sailing vessel, and such vessel should be steered erroneously, if the master of the steam vessel should wilfully say this vessel is steering wrong, but we will keep our course, and a collision ensues in consequence, I should undoubtedly hold that the steam vessel was to blame." The same rule is substantially applied at common law.

In Butterfield vs. Forrester, 11 East, 60,

Lord Ellenborrough observes: "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it if he do not himself use common and ordinary caution to be in the right. In cases of persons riding upon what is considered to be the wrong side of the road, that would not authorize another purposely to ride up against them. One person being in fault will not dispense with another's using ordinary care for himself."

In Davis vs. Mann, 10 M. & W., 555.

An ass was fettered and turned upon the highway to graze, and

there run over by the defendant in driving too fast. Held, "That "the mere fact of putting the ass upon the road would not bar the "plaintiff of his action, for as was observed, although the ass may "have been wrongfully there, still the defendant was bound to go "along the road at such pace as would be likely to prevent mischief. "Were this not so a man might justify driving over goods left on the "public highway, or even over a man lying asleep there, or to pur- "posely run against a carriage going on the wrong side of the road."

See also Angell on Higways, section 345.

The Continental, 14 Wall., 345.

This was a collision between the steamboat Continental and the propeller North Hampton. The North Hampton had no central range of white lights, for the want of which, as the Continental alleged, she mistook it for a sailing vessel and starboarded instead of porting. She was mistaken for a sailing vessel because she did not have the stern light. The propeller was admitted to be in fault, but the Continental was also condemned for the want of seasonable precautions. "Absence of lights in a case falling within the acts of Con- "gress renders the owners liable for the consequences resulting from "the omission, but it does not confer any right upon the other vessel "to disregard or violate any rule of navigation, or to neglect any "reasonable or practicable precaution to avoid a collision which the "circumstances afford the means and opportunity to adopt." "Navi- "gators have no right arbitrarily to assume, under all circumstances, "that every vessel approaching which does not show both the signal "lights and the central range of two white lights is a sailing vessel, "which is bound to keep, and that if she does not she may be run "down and sunk."

The Nathaniel Holmes, 1 Bond, 352.
Nelson vs. Leeland, 22 How., 48.
Trow vs. The Central Railroad Co., 24 Ver., 484.
The Good Friend, 1 Bond., 459.
The Maria Martin, 12 Wall., 31.
The New Champion, 1 Abbott, 202, 207.

The Cornelius C. Vanderbilt, 1 Abbott, 361.

This was a collision between the steamer Vanderbilt and the sloop Grocers, off the Battery. The two vessels were crossing. When several rods apart the sloop was hailed from the steamer to *luff*, or to put her helm down. The master of the sloop replied, "he would be d—d if he would." It was satisfactorally proved to have been within the power of the schooner to avoid a collision without hazard to herself or other inconvenience than that of luffing into the wind and a few moments delay. It was contended by the libellant that she was not bound to take this step, or do anything other than hold his

course upon the wind. The sloop was condemned for failing to luff up into the wind. "And more especially will all privilege to a particular tack or course, or method of passing not essential to her own safety be withdrawn from a vessel when she has notice that adhering to it will place another in jeopardy. She must then contribute to the common safety in such manner as a sound judgment on the facts and circumstances shall decide to have been necessary and proper."

It is unnecessary to consider what particular maneuver the brig should have executed. She was sailing with a fair wind and was as easily mannaged as a steamer. Starboarding but half a point would have sent her far astern of the tug. She might even have come around and up into the wind. The tug was seen at a distance that afforded her every opportunity of avoiding a collision. It will also be borne in mind that at the time of the collision, although it was still dark, the hull of the tug could be seen in time to avoid her even if no lights had been displayed.

Before closing this case I desire to make some comments upon the opinion of the Circuit Judge which is sent up in the record of this case.

Although "given with some doubt and after much hesitation," folio 176, a principle of law is enunciated with great clearness and with apparent confidence in its correctness.

In the earlier part of this case great stress is laid upon the amendment to the libel as setting up a different cause of action from that originally contemplated. His honor states, folio 177, "No confession of fault was made, but a case stated hav-" ing in none of its features the most distant resemblance to " the facts as they are now conceded at the bar, and contained " in the amended libel. This false case was sought to be sup-" ported by testimony so inherently absurd that it is unworthy " of criticism. In all this there is much which, unexplained, " is so highly unconscientious as to merit censure and essen-" tially affect the right to relief."

Taken in connection with the evidence this statement is somewhat peculiar to say the least. The libel was framed from the statement of the officers and crew of the tug, and from the facts as they appeared to those on board of the tug. It did appear to the lookout that the schooner was coming up

the lake in a course that would have taken her astern of the tug had she continued to hold that course, and it seemed to them that her course must have been changed before the collision, On the trial, however, three witnesses on the bark swore that her course was entirely unchanged up to the moment of the collision. There is a well known rule frequently applied to collision cases to the effect that the evidence of the officers and crew of each vessel with regard to the movements of his own vessel shall be deemed to be true as against the evidence of others who judged only from eppearances what they supposed those movements were. This rule has been applied in a large number of cases by this court. Acting upon this rule it was conceded, not that the lookout had sworn falsely, nor that he had underrated the facts as they appeared to him, but that there was a preponderance of evidence that the bark had not changed her course, and it was insisted that from the testimony of her own crew the fault of the bark was so gross that it must be condemned in a moiety of the damages, and this was the view taken by the District Judge. The facts set forth in the amendment to the libel were such as our crew could not have known themselves, but which were clearly proven by the testimony of the bark.

Even under the stringent rules of pleading adopted by the Court of Admiralty in England, a new case may be set up when the alleged fault was not within the knowledge of the party when the libel was originally drawn.

See The Bothnia, 1 Lush., 53.
The East Lothian, 1 Lush., 244.
The Secret, 1 Asp. Mar. Cases, 318.

The Martin Wyncoop, 10 Blatch., 167, the libel alleged that the collision occurred because the vessel sued shifted her helm from starboard to port, and it was not clear from the evidence tha that was the fact, but the libel also alleged that the vessel sued was not able to avoid the collision, and was not negligently and carelessly navigated, that she ran into the other vessel which was lying passive, and the evidence sustained the allgation.

Held, the failure to prove the alleged mode in which the

collision occurred was no ground for refusing a decree to libellants.

In the Maybey & Cooper, 14 Wall., 205, relied upon by the learned Circuit Judge, the answer was amended by inserting an allegation that the ferry boat suddenly and improperly crossed the bows of the tug, and the Court remarks that "this defense, if founded in fact, could easily be proved by those who were on board the ferry boat, and know what occurred. Instead of that not even the name of the ferry boat is given, and not a witness is called except the pilot or master of the ship, and their statements in that behalf are not stated." The Court found in this case simply that there was no evidence to support the allegation in the amended answer, not that the amendment itself was improper. In the present case the facts set forth in the amendment are substantially omitted, and are gathered from the mouths of claimants and witnesses.

The matter was solely one within the discretion of the District Court. That Court found simply that there was a preponderance of testimony in favor of the theory that the bark did not change her course as alleged in the original libel, but upon her own showing was guilty of a gross fault, contributing to the collision, and that the libel should be allowed to be amended, that the proofs might correspond with the allegations.

The cases relied upon by the learned Circuit Judge to sustain his judgment upon the facts of the case, it seems to me, fall very far short of the purpose for which they are cited. In the case of the "Test," 5 Notes of Cases, 276, there was a collision between two sailing vessels, both of which were close-hauled, the one on the port the other on the starboard tack. In giving his opinion, Dr. Lushington says that he does not mean to say that any vessel is justified in coming into collision if she can escape it, because common sense and a common regard for property and life, establish the universal principal that no persons must wilfully come into collision with another vessel. He found, however, that the Mayflower, whose duty it was to keep her course, was justified in so doing

because there were no circumstances established by the evidence to show that she ought to have done otherwise.

It is freely conceded in the present case that the general rule should be followed where there are no special circumstances calling for a departure from it, and no indication that a collision will ensue on adhering to it. We claim, however, that such circumstances did exist in this case.

The case of the "George," 5 Notes of Cases, 368, has no application. In that case two sailing vessels, one close-hauled and the other free, met in the night. The question was whether, when two vessels are meeting in the night, and it is impossible to ascertain whether the other vessel is close-hauled or not, the vessel on the port tack, close-hauled, ought to port her helm as well as the vessel on the starboard tack. The Court found that the vessels were approaching each other stem on, and that it was the duty of each to port.

The case of the "Superior," 6 Notes, 607, is equally inapplicable, though the general rule there announced is that the vessel entitled to the right of way should keep her course.

In the case of the "Vivid," 7 Notes, 127, a steamer was condemned for failing to get out of the way of a brigantine. The general rule is laid down that it is the duty of a steamer to avoid a sailing vessel. The steamer was condemned, not only for this but for too great speed; but the case throws no light on the one at bar.

In the case of the "Sara Clasina," 7 Notes of Cases, 579, a vessel close-hauled on the starboard tack, apprehending a collision with another vessel sailing free at night, having, in order to ease the blow, starboarded her helm, was held to be to blame. The question was whether the vessel was justified in departing from the general rule, and the Court freely admitted that if a necessity for so doing existed, no doubt could be entertained that the starboarding was justifiable, for it is a mere truism to say that no man is bound by a technical rule to submit to the destruction of life and property, but the burden upon the proof is upon the party so deviating from the general

rule. The Court held that the necessity for deviating from the rule did not exist in this case.

In all of these cases both vessels were in motion, and of course it was impossible for the vessel whose duty it was to keep her course to say whether the approaching vessel was going to obey the rule or not. In the present case, however, the steamer was at rest. Had the proper lookout been kept upon the bark we would have been perceived, and the necessity of deviating from the rule, or at least for hailing her, would have been apparent some time before the collision occurred.

In the case of the "Esk," L. R. 2 A. and E., 350, a vessel with her anchor down, but not actually holden by and under the control of it, was held to be a vessel under way within the meaning of the articles, and bound to exhibit colored lights. Having been treated as a vessel at anchor, from the fact of her exhibiting a white light, a collision occurred with another vessel, and the Esk was held in fault for failing to exhibit colored lights. The Court intimated, however, that if there had been a bad lookout on the other vessel she would have been condemned.

In the case of the "Ariadne," 7 Blatch., Judge Woodruff decided that where a sailing vessel failed to exhibit proper lights it was not for her to insist that by more than usual vigil ance she might have been discovered from the steamer at a few yards greater distance and claim contribution on that ground. This case, however, was reversed by this Court, and it was held that the obligation of a lookout is of the highest kind, and that notwithstanding the schooner, the steamer was also in fault for failing to observe her.

All that was decided in the case of the "William Young," Olcott, p. 38, was that if a collision is occasioned by the alteration of the course of a sailing vessel it devolves upon her to prove the propriety or necessity for such movement.

The case of the "Corsica," 9 Wall., 630, was a collision between two steamers, and it was held that where a collision occurs from a vessel not having kept on her course, the obliga-

tion rests on her to show sufficient causes existing in a particular case to render a departure from the rule necessary to avoid immediate injury.

All these cases, as well as the others cited by the learned judge, merely affirm the general principle, that where a vessel departs from the general rule of navigation the burden is upon her to show the necessity for such departure. Our case rests upon the theory that there were sufficient circumstances to show to the bar the necessity for taking some active measures to avoid a collision, and that her failure to do this renders her liable in a moiety of damages.

We submit that the Circuit Court was wrong in reversing the decree of the District Court; that the decree of the Circuit Court itself should be reversed, and libellants be entitled to recover the amount originally adjudged to them.

NEWBERRY, POND & BROWN,
Libellants' Proctors.

W. A. MOORE,
H. B. BROWN,
Advocates.

SUPREME COURT

— OF THE —

UNITED STATES.

JOHN MINER, Owner of the Steam Tug Goodnow,

vs. *Libellant and Appellant,*

THE BARQUE SUNNYSIDE,

THOMAS PITTS, Executor of Estate of H. Norton Strong, deceased,

AND *Claimant and Appellee.*

THOMAS PITTS, Executor, &c.,

vs. *Libellant and Appellee.*

THE STEAM TUG GOODNOW,—John Miner,

Claimant and Appellant.

IN ADMIRALTY.

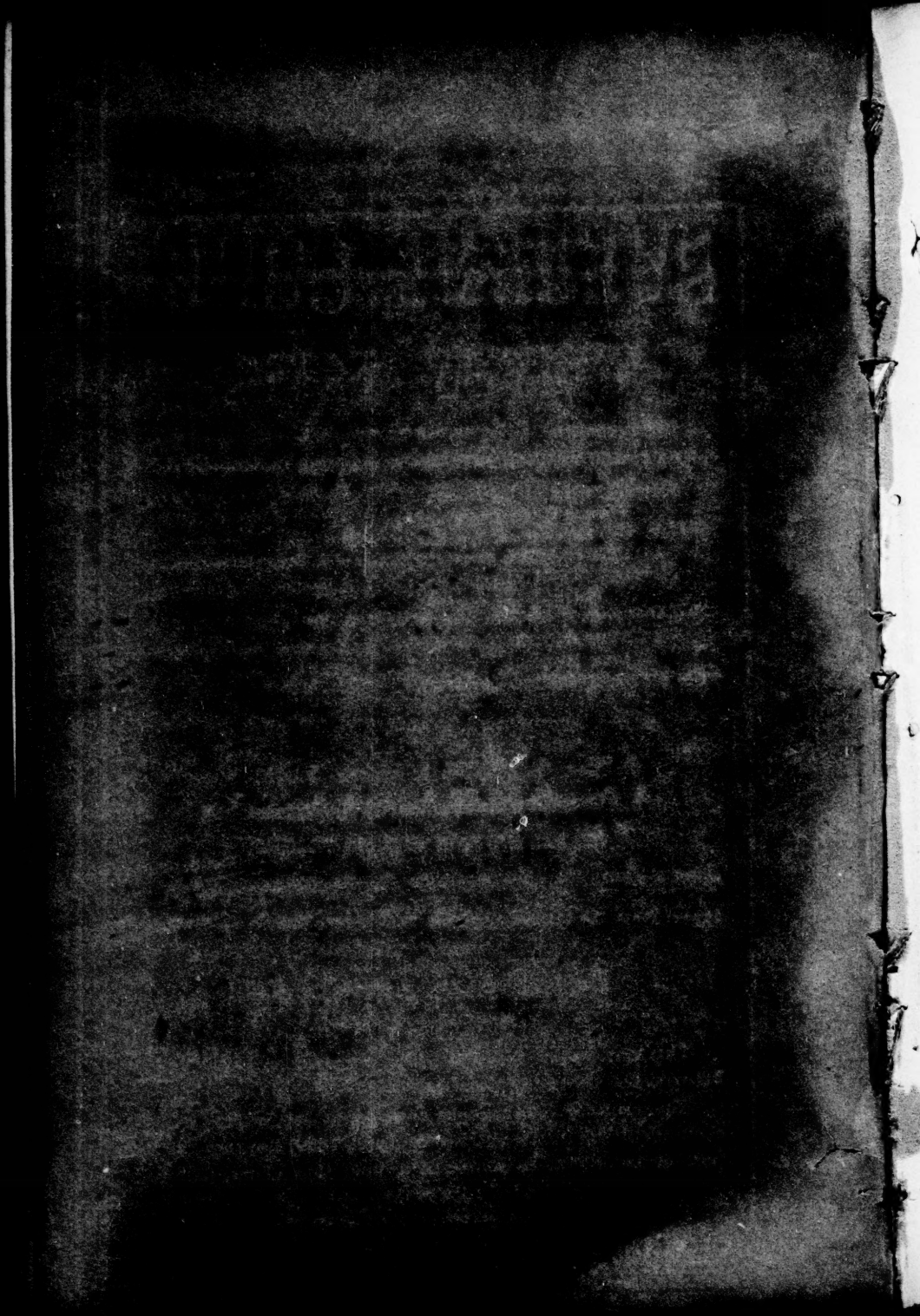
ON LIBEL AND CROSS LIBEL FOR COLLISION.

Appeal from the Circuit Court for the Eastern District of Michigan.

BRIEF FOR APPELLEE.

F. H. CANFIELD,
Advocate

DETROIT.
O. S. GULLEY'S STEAM PRESSES, 10 & 12 LARNED STREET, EAST.
1875.



SUPREME COURT

OF THE

UNITED STATES.

JOIIN MINER,
Libellant and Appellant,
vs.
THE BARQUE SUNNYSIDE,
THOMAS PITTS, Executor, &c.,
Claimant and Appellee.
AND
THOMAS PITTS, Executor, &c.,
Libellant and Appellee,
vs.
THE STEAM TUG GOODNOW,
JOHN MINER,
Claimant and Appellant.

IN ADMIRALTY.

ON LIBEL AND CROSS LIBEL FOR COLLISION.

Appeal from the Circuit Court for the Eastern District of Michigan.

BRIEF FOR APPELLEE.

This is a case of collision which occurred on Lake Huron, between the steam tug Goodnow and the barque Sunnyside.

The original libel alleges that, about ten o'clock in the evening, of the thirteenth day of June, 1869, the tug left the port of Lexington in search of a tow; that about half past

eleven o'clock of the same evening, when about three miles from land and about the same distance above Lexington, the engine was stopped and the tug hove to; and that she lay in this position, heading east by north half north, in wait for a tow until the collision took place.

That the night was clear and fine, a brisk wind blowing from the south-west; that the lights of the tug were properly placed and burning brightly; and that during the night a large number of vessels, showing their green lights, passed up the lake between the tug and the Michigan shore.

That about three o'clock in the morning, the Sunnyside was seen coming up the lake, apparently in the track of the vessels which had preceeded her, showing a *green* light, and bearing *from two to three points off the tug's starboard quarter;* that when she had approached within about 100 rods of the tug, showing enough *of her broadside* to indicate that unless she changed her course, she would pass some distance astern, the barque suddenly kept off, *and steered directly for said tug*, and very soon thereafter struck the tug on her starboard side, nearly abreast the pilot house, causing her to sink in about fifteen minutes.

The answer to this libel denies that the tug was properly officered or manned, or that her officers or men were properly stationed, and on the look-out for the safety of the tug:

Admits that the tug lay with her engine stopped, heading eastward; denies that the barque changed her course as stated in the libel.

Avers that the tug lay in the lake directly in the path of vessels, and where they were continually passing, with her engine stopped, but with steam up, without proper lights, with no look-out, or officer on deck; that the barque was passing up the lake heading north half west, under all sail, going steadily on her course, with a stiff breeze from the south-west, with proper lights, with officers and men properly stationed, and with look-out forward.

That the bright and green lights of the tug were seen on port bow of the barque, indicating a steamboat standing to the eastward across the course of the barque; that the barque

kept steadily on her course until the collision became imminent, when her helm was ordered hard up, but before the order took effect the collision occurred, causing serious damages to the barque.

It also denies all negligence on the part of the barque, and avers that the collision was caused by reason of the negligence of the tug.

On the same day a cross libel was filed by the owner of the Sunnyside against the tug, setting up, substantially, the same facts as those alleged in the answer.

To this cross-libel no answer was filed by the owner of the tug. He however filed a *claim* to the tug, and subsequently bonded her. Rec. p. 25.

The cause was first tried in the District Court, and, at the hearing, the libellant obtained leave to file an amendment to his libel, by inserting at the end of the fourth article, the words: "That said tug was lying motionless upon the water, "and out of the track of vessels going up the lake; that, as "your libellant is informed and believes, no proper look-out "was kept on said barque, and that said collision was occa- "sioned by the fault of the officers and crew of said barque to "see said tug, to discover that she was not in motion, and to "take steps to avoid her." Rec. p. 7.

The District Court held both vessels to have been in fault, and divided the damages. From this decree the owner of the Sunnyside appealed to the Circuit Court, where the decree of the District Court was reversed, and tug held to be wholly in fault. From this latter decree the owner of the tug has appealed to this Court.

In behalf of the appellee and respondent, we insist, that the decree of the Circuit Court should be affirmed.

While there is a direct conflict in the testimony, the following facts are, we believe, conceded:

1st. That the tug lay in the path of vessels going up and coming down the lake, in the night time, with her engine stopped, but with full steam up; heading to the eastward, with her white and colored lights burning brightly, and with her wheel lashed to starboard. that the tug made no effort whatever to avoid the barque, nor did she in any way signal the barque of the danger

2d. That the barque had her proper lights properly displayed; that her look-out discovered the lights of the tug at such a distance that she might have avoided the tug, had it been known that the latter would not herself have made some effort to get out of the way; that when discovered, the green light of the tug bore a little over the port bow of the barque; that the look-out at once reported the light to the mate in charge of the barque, who came forward, observed it, and knowing it to be a steamer, and supposing that she would keep out of the way. gave no order to the man at the wheel.

That the barque steadily kept her course until collision was inevitable, when her wheel was put hard aport, but too late to avoid the disaster; that the barque struck the tug forward of the pilot house, sinking her in about 15 minutes.

I.

AS THE OWNER OF THE TUG DID NOT APPEAL FROM THE DECREE OF THE DISTRICT COURT, HE CANNOT NOW DENY OR QUESTION THAT THE TUG WAS IN FAULT.

That decree declared both the tug and the barque guilty of fault, and the owner of the latter alone appealed. The libellant having failed to appeal to the Circuit, he is bound by the decree of the District Court. This doctrine has been repeatedly held by this and other Courts. in admiralty cases.

The Comet, 9 Blatch., 328.
The City of Antwerp and The Frederich, 2 P. C. Appeals, 25.
The Maybey and Cooper, 14 Wallace, 328.
The Quickstep, 2 Bissell, 291.
Aisey vs. Merrill, 2 Curtis, 8.
The William Bagaley, 5 Wallace, 412.
The Quickstep, 9 Wallace, 665.
The Maria Martin, 12 Wallace, 31.

In the case of *The City of Antwerp and The Friedrich*, above cited, which was upon libel and cross-libel for collision, answers were filed to both the libel and to the cross-libel. The Court of Admiralty held that both vessels were in fault, and

divided the damages. The owner of *The City of Antwerp* alone appealed. Lord Westbury, delivering the opinion of the Privy Council, said: "The case made on behalf of *The Friedrich*, in her petition is distinctly stated and if it had been believed by the Court below, it would have been impossible to hold that the *Friedrich* was to blame; but it was rejected by the Court below, and as the *Friedrich* has not appealed from the decision declaring that she was in the wrong, it is *res judicata* that the case made by her petition is not substantiated, and her allegations are not entitled to credit."

Although in his libel and in his depositions the appellant and his witnesses have sworn to a case, which, if true, would show the barque wholly in fault, and himself innocent, he comes into *this* Court upon very different grounds He now confesses his own fault, and seeks only to divide the damages occasioned by the collision, by an attempt to prove a contributory fault on the part of the barque.

The cross-libel makes a case, which, if undisputed, shows that the tug was solely in fault for the collision.

The record shows no denial of the case so made, No answer was ever filed to the cross-libel by the appellant. He simply entered an appearance and filed a claim to the tug as owner after she was siezed under the attachment.

Record, Folio 25.

The only way in which the allegations in a libel can be contested is by an answer. If no answer is filed, those allegations are to be treated as admitted by the respondent.

Benedict's Practice, §465.
2 Parsons, S. and Admr., 422.

That this rule applies to cross-libels, was settled by this Court in *Ward vs. Chamberlain*, 21 *How.*, 574, where it is said that "when a cross libel is filed, the liballants in the first suit regularly become respondents in the cross-libel, and as such, they must answer or stand the consequences of default."

There is no stipulation to waive an answer to the cross-libel.

If the libel and cross-libel are to be treated as separate causes, then there can be no doubt that the appellant has no standing in this Court to contest the decree of the Court below, so far as it awards to the appellee the full amount of damages suffered by the Sunnyside, because the amount involved does not come within the jurisdiction of the Court.

So far then as the case under the cross-libel is concerned, it stands as though no appeal to this Court had been taken, and the decree of the Circuit Court in that case must be considered as *res judicata* as to the entire question of fault between the two vessels.

But waiving this preliminary question, we insist, that, upon the merits of the case, as disclosed by the record, the decree of the Circuit Court should be affirmed.

Before proceeding to the discussion of the merits, will your Honors please consider how anomalous a case is presented by this record?

In a clear, still night, on a broad and open lake, a powerful steam tug, capable of the greatest speed, with full steam up, is run down and sunk by *a sailing vessel*, whose signal lights were properly displayed, and burning brightly, which, as the proofs show, and as, I believe, is now conceded, did not change her course. Neither in the records of the Court, nor anywhere in the books, can such a case be found. No case can be found where a sailing vessel with proper signal lights, *which has not deviated from her course*, has been condemned for a collision with a steamer, where the latter exhibited the lights of a steamer in motion, and yet made no effort to get out of the way, or to signal the approaching vessel her inability to do so. We believe that in every reported case of collision between a steamer and a sailing vessel, the attempt has been made to show that the latter changed her course. And in no case has the vessel been condemned for colliding with a steamer not disabled, unless such change of course has been proven, or unless the vessel in some way misled or deceived the steamer. If, in this case, the Sunnyside shall be condemned, a new precedent will be established for Courts of Admiralty.

II.

THE RECORD SHOWS THAT THE BARQUE WAS PROPERLY OFFICERED, MANNED AND EQUIPPED; THAT HER LOOK-OUT WAS COMPETENT AND PROPERLY STATIONED AND ATTENTIVE TO DUTY; AND THAT DUE CARE AND DILIGENCE WERE EXERCISED IN THE MANAGEMENT OF THE VESSEL.

Fratus, look-out.

Folio 56.—Sailor for 14 or 15 years; was look-out on the Sunnyside at time of collision. "When I first saw the tug I made her green and bright lights about half a point over the port bow; I was standing on the top-gallant forcastle, which is elevated three steps above the main deck; I reported the light to the officer of the deck; he came forward and looked at it; he remained with me three to five minutes; the vessel, bearing the red and green light, appeared to be heading to the eastward; I couldn't tell if she was in motion; our vessel continued straight on her course from that time till the collision; could see a vessel's hull on that night, about a mile or half a mile distant; it was quite cloudy; I reported the light a second time because she was so close; I thought it was (as the mate told me) a steamer heading to the eastward; after reporting the second time, the mate ran forward, and as he ran, he hallooed to the man at the wheel to put the helm to port; as we struck I could see the same lights on the tug that I had seen from the first."

Bell, mate.

Folios 50, 51.—A sailor for 20 years, on salt and fresh water, as seaman, first and second mate. "The wind was about S. S. W., about a nine knot breeze; the vessel was going about nine miles an hour; when we first saw the tug we were heading on our course, N. ½ W.; we made tug's green light and her forward bright light; when I saw those two lights, I saw she was a steamboat of some kind, apparently heading to the eastward; the look-out man sung out to me and I ran forward and saw. Our look out was stationed on the top-gallant forecastle in the forward part of the vessel; when he called to me,

I was walking aft, looking to leeward under the mainsail for lights, and watching the compass and seeing that the vessel was kept on her course; the wheelsman and look-out were both good, competent men; we were under full canvass; had good lights, burning good, and in proper places; red on port, green on starboard; it was a cloudy night; could see a vessel's light a mighty little distance—a very short distance; when look-out first called my attention to her, the tug might have been from one and a half to two miles distant; she might have been nearer; I gave no order to the wheel; told look-out I supposed it was a steamer and guessed she would take care of herself, and then went aft and looked at a couple of red lights made over starboard beam, and pretty near us, to see if we would go clear of them or not; at the same time I was looking out expecting to see the tug's lights to leeward; I supposed she would cross our course; the next I heard of the tug was, when the look-out sung out to me that the light was close under our bows; I shouted to the man at the wheel, "Hard up," that is, to put his wheel hard-a-port."

I submit that the testimony, which I have so fully cited, shows clearly:

1. That the mate and look-out were experienced and competent men.

2. That the look-out was properly stationed.

3. That he was attentive to his duty.

4. That he promptly and properly reported the tug's lights to the officer of the deck.

5. That this officer was at his proper post, aft, near his compass.

6. That he acted promptly and properly upon hearing the report of the look-out, by going forward and examining the lights.

7. That having discovered the lights to be those of a steamer, and believing that she would take the timely precautions necessary to avoid a collision, he so remarked to the look-out, and then returned to his proper post aft, where he could observe his compass, and the lights of other vessels near him.

8. That when the look out discovered that the tug was not

going to make any attempt to give way to the barque, and danger to be imminent, he again reported the light to the officer, who, at once, caused the wheel to be put hard aport, but too late to avoid the disaster.

Now whot more could be required? What act did either the look-out or mate do which they ought not to have done, or wnat did they leave undone which they ought to have done, under the circumstances?

a. It is claimed that after reporting the lights to the mate, the look-out "paid no further attention to them, nor was any watch or notice taken of them until the collision was inevitable." In other words that the look-out did not *see* the lights of the tug from the time he reported them until they were right under the bows of the barque, and therefore for this assumed neglect of duty on the part of the look-out, the barque is to be condemned.

But is this probable? The look-out was an experienced sailor. That he was attentive to duty is shown by his promptly reporting the lights of the tug when they were first seen at a long distance ahead, and by his again reporting them when the danger became imminent. There is neither custom nor rule of law which demands that the look-out, under the circumstances of this case, should report the light a second time before the danger became imminent. Until that mo nent, it was the duty of the barque to hold her course. That the look out was unmindful of the lights ahead, or that be did not "*see*" them from the time he first reported them until the moment of collision, is wholly inconsistent with his testimony which is not contradicted.

b. The conduct of the mate shows no want of care on his part. He had no other duties as officer of the deck, beside watching the lights of the tug. There were other vessels and other lights in the neighborhood, which demanded his attention quite as much as those of the tug. Had a collision occurred with these other vessels while the mate was forward watching the tug, he could not have excused himself. It would then be said, and properly, that he should have left the tug to take care of herself.

We think that the authorities which we cite under our fourth proposition fully sustain all that we claim respecting the conduct of both our mate and look-out.

See especially

The Fannie, 11 Wallace, 238.
The City of Paris, 1 Benedict, 174.
Ibid, 9 Wallace, 634.

III.

THE BARQUE DID NOT CHANGE HER COURSE, AS CHARGED BY THE LIBELLANT.

The necessity is slight for the argument of this point; for although the libellant and his chief mate, and principal witness, have twice sworn positively that the barque did change her course, yet it is, I believe, now conceded by his counsel that the fact is directly the contrary.

I desire, however, to call your Honors' attention to the testimony upon this point, because of the bearing which it has upon the equities of the case, and as affecting the rights of the appellant to recover.

It shows a deliberate intention on the part of the appellant and his witnesses to *falsify* the facts, for the purpose of making a case in which the *law* could authorize the recovery.

Swartout, First Mate of the Tug,

And in command of her deck, at Rec. Fols. 31, 32, tells this preposterous story: "When I came on deck, Capt. Miner told me to look out and see if I could see any tugs pass, and go to them. He wanted me to find out when our turn came to pick up a tow. I saw no lights for about an hour after I came on watch; then the vessels began to come up the lake, showing their green lights. The wind was S.W., a 12-knot breeze About two o'clock there was a squad of vessels came, about 10 or 15; they seemed to come in a bunch, as if they had all been towed out together. They were all showing green lights but one, and she showed me a red light for about two minutes, and then passed under our stern. They passed astern

of us from one-eighth to one-quarter of a mile. Then they came along but seldom, and all went under our stern that did come. A few minutes before the collision, I was standing on our quarter-deck, and the lookout man reported 'another vessel coming.' I said, 'Yes, I see it;' and in a minute he said, 'there's another one;' and I said, 'yes, I see it.' This last proved to be the vessel Sunnyside. I stood there and watched the Sunnyside coming up, and showing me her green light, until she got within one hundred rods or thereabouts—may be a little more or less; I turned round, and looking forward I saw a light off our port bow, which I supposed to be a tug. I turned round again, and looking at the Sunnyside saw she was going all clear of us. I looked at her starboard broadside, and I could make her out to be a black, loaded barque, she was that close; and following up another one, about a mile or two ahead of her. I started forward, taking my eyes off the Sunnyside to see another vessel that was forward, as I couldn't see from where I was forward very well, owing to the wood that was piled up there. When I got about midships, standing on the rail, holding on to the stay-chain-pipe, the first thing I saw was her jib-boom coming over the tug just forward of the pilot-house. * * * The tug sunk in about 15 or 20 minutes. * * * Don't know the vessel ahead of the Sunnyside. It was a big, white barque, apparently light. She passed astern of us, from one-eighth to one-quarter of a mile, When I went forward, I could see the hull of the Sunnyside, and that she was a black barque, and appeared to be loaded deep. If we had been heading up the lake on our course, she would have bore about two points on our port quarter. She appeared to be steering about N. by W. Her course appeared to be right after the course of the white barque. Had she kept her course, she would have passed astern of us one-quarter of a mile at least. She appeared, when I last saw her, to be luffing up a little—keeping up nearer to the land; hence I judge she would pass nearer to the land than the white barque would. When I went forward I could see the length of her starboard side. She was about 100 rods distant. She appeared to have all her sails and studding sails set. I never saw her red light until after the collision."

This is the only witness, on the part of the tug, who saw the Sunnyside previous to the collision. But Miner, the appellant, who was master of the tug, and on board at the time, swears to the same general facts, in the libel, respecting the change of course by the barque. And the protest, which is sworn to by both the master, the mate, and the entire crew of the tug, as being "*true in all respects*," repeats the same story.

But the story is absurd. No court would believe it, even if it were not contradicted.

It would be utterly impossible for the Sunnyside, sailing N. by W., on a course which would take her a quarter of a mile astern of the tug, suddenly, when within one hundred rods from the tug, to have changed her course so as to strike the tug as she lay, forward of the pilot-house! Had the officers and men of the barque intended to do so, it would have been utterly impossible for them to have navigated their vessel so as to produce such a result.

If your Honors will place the vessels in their respective positions, as sworn to by this witness—the barque at the distance of one hundred rods from the tug, and on a course which would have taken her one quarter of a mile astern of the tug, and the tug heading E. by N. ½ N.; and then refer to the diagram, Rec. pp. 25, 26, showing the angle at which the vessels came in contact, you will see at once the entire correctness of our argument, and you will not hesitate to approve of the comments made by the learned Circuit Judge upon the case of the appellant. Rec. p. 75, fols. 187, 178.

b. But the testimony on the part of the barque directly contradicts the officers of the tug, and shows that the barque *did not* change her course.

Bell, the Mate in Command, Folio 53;
Fratus, the Lookout, Folios 56, 57;
Smith, the Wheelsman, Folio 59;

All swear that their vessel was kept steadily upon her course until the collision was inevitable.

c. The District Court so found, Rec. p. 69, folio 162. And

the appellant's counsel now concedes that this finding is correct. Rec. p. 75, folio 177.

This fact, therefore, must be considered as fully established; and the only question now to be considered is whether the barque was in fault for not changing her course.

I submit that this question must be decided in the negative.

IV.

UNDER THE CIRCUMSTANCES IT WAS NOT ONLY RIGHT, BUT THE DUTY OF THE BARQUE TO KEEP HER COURSE, AND OF THE TUG TO KEEP OUT OF THE WAY. HAD SHE CHANGED HER COURSE. IT WOULD HAVE BEEN A VIOLATION OF THE LAW ON HER PART, FOR WHICH SHE WOULD HAVE BEEN CONDEMNED HAD COLLISION OCCURRED.

This proposition is based upon the following rules applicable in such cases, which were adopted by act of Congress in 1864:

ARTICLE XV. "*If two ships, one of which is a sailing ship and the other a steamship, are proceeding in such directions as to involve risk of collision, the steamship shall keep out of the way of the sailing ship*

ARTICLE XVIII. *Where, by the above rules, one of two ships is to keep out of the way, the other shall keep her course, subject to the qualifications contained in the following article.* [Art. 19.]

The tug, with full steam on, and with her colored signal lights displayed, was at liberty to take any measures it saw proper to avoid the barque, either by moving backward or forward. "She was waiting for a tow, in accordance with a well known usage." Although she was directly in the way of the barque, the tug had a right to lie there until there wsa danger of collision, or until collision was probable. If any danger or risk was involved, it was something which the tug had willingly and knowingly assumed.

No fault can be charged respecting the conduct of either vessel until collision became probable. But it is only at this point that the rules prescribed by Congress, and to which we have referred, apply. These rules require that the barque, from the moment collision was probable, should keep her course. And they required of the tug that from that moment *she* should take the necessary precautions to avoid the vessel.

Had the barque, upon discovering the tug lying in her course, attempted to avoid her by a change of course, however honest might have been the intention of her officers, the Court would not hesitate to pronounce her solely in fault had accident occurred.

The officers of the barque, seeing the tug with the lights of a steamer in motion, and with steam on, had a right to assume that the tug would adopt the precautions necessary to discharge the duty of getting out of the way. They had the right to rely with full confidence upon the assumption that her officers would *obey the law*.

There was nothing ambiguous or doubtful in the situation or appearance of the tug. That she was lying in the pathway of the barque was not an unusual circumstance, and therefore it was not calculated to awaken any apprehension on the part of the barque, or demand any extra or unusual precaution at the hands of her lookout or pilot. On the contrary, the fact that many other vessels were in the vicinity, passing up and down the lake, was an assurance to the officers of the barque that those in charge of the tug would not fail to exercise the care and vigilance which the situation demanded.

No one, upon discovering the lights of the tug, would have dreamed that her master, lookout, wheelsman and engineer had deserted their posts of duty, and had abandoned all care and caution for the safety of their vessel. Yet such was substantially the case as it actually existed. All care and caution on the part of the officers and men of the tug were abandoned. This, we think, is abundantly shown by the record. Had there been a lookout on deck, he would have been sworn as a witness. If there had been a single man aboard attending to duty, he would have seen the barque long before the danger

became imminent, and the false and absurd story which we find in the tug's protest, and which is repeated in the libel, and by her witnesses, would never have been told.

a. The sailing rules which we have cited are the *law* of this case. They have long been established; they are universally understood, and the safety of life and property upon the waters depends in a very large degree upon a strict adherence to them. The barque cannot be held to be in any degree in fault, unless the Court can find from the record that a departure from the rules was demanded, and that her officers were negligent in not discovering the necessity.

The following familiar cases are cited, not for the purpose of showing the general rule that a steamer must get out of the way of a sailing vessel, but to illustrate *how strictly and rigidly* the courts have enforced the rules, and how reluctantly any exceptions to the rule have been admitted.

10 How. 557; St. John vs. Paine.

A sailing vessel discovered a steamer a long distance ahead, and had she changed her course might have avoided the collision. She, however, kept her course, relying upon the steamer to keep out of the way. This the latter failed to do, and was held to be solely in fault. The court, at pp. 581, 582, comments upon the *rules*, and, after reviewing the English decisions, at p. 483, say:

"These rules, which are the result of the practical experience and wisdom of navigators, cannot be too strongly impressed upon the observance of those engaged in the management of vessels upon our rivers or other waters; and it is the *obvious duty* of the courts to apply them *strictly in all cases of collision*, unless where a *clear* exception is established by *the party seeking to excuse himself for a departure.*" And referring to the duty of steamers meeting sailing vessels, the court says: "They are also of vast power and speed compared with craft propelled with sails, exposing the latter to inevitable destruction in case of collision, and rendering it at all times difficult, and not unfrequently impossible, to get out of their way. Greater caution and vigilance are therefore naturally to be exacted of those in charge of them, to avoid the dangers of navigation." "As a general rule when meeting a sailing vessel, whether close-hauled or with the wind free, the latter has a *right to keep her course*, and it is the *duty* of the steamer to adopt such precautions as will avoid her." * * * "By an adherence to this rule on the part of the sailing vessel, the

steamer will be enabled to adopt the necessary measures to avoid the danger, as she will have a right to *assume* that the sailing vessel *will keep her course.* If the latter fails to do this, the fault will be attributable to her."

The ruling of the Court, in the case cited, has never been departed from, but has been steadily followed.

18 How., 583; Crocket vs. Newton.

The Court, Justice Curtis, delivering the opinion, says:

"It must be remembered that the general rule is, for a sailing vessel, meeting a steamer, to keep her course, while the steamer takes the necessary measures to avoid collision. And although this rule should not be observed when the circumstances are such that it is apparent its observance must occasion a collision, while a departure from it will prevent one, yet it must be a *strong* case which puts the sailing vessel in the wrong for obeying the rule. The Court must clearly see, not only that a deviation would have prevented collision, but that the master of the sailing vessel was guilty of negligence or a *culpable want of seamanship* in not *perceiving* the necessity for a departure from the rule."

U. S. Steamship Co. vs. Rumball; 21 How., 372.

In this case, as is usual, an attempt was made on the part of the steamer to show that the sailing vessel changed her course. The Court, however, found the fact to be otherwise, and held the steamer to be solely in fault. The rules applicable in such cases were fully discussed. At p. 383 the Court says:

"Sailing vessels, when approaching a steamer, are required to keep their course; and steamers, under such circumstances, as a general rule, are required to keep out of the way. These rules were framed and are administered to prevent such disasters, and to afford security to life and property exposed to such dangers, and *public policy*, as well as the best interests of all concerned, requires that they should be *constantly* and *rigidly* enforced in all cases where they apply." P. 384: "Sailing vessels approaching a steamer are *required* to keep their course, on account of the correlative duty which is devolved upon the steamer to keep out of the way, in order that the *steamer* may know the position of the object to be avoided, and may not be led into error in endeavoring to comply with the requirement. The *steamer* is required to exercise the necessary precautions to avoid a collision; if this be not done, *prima facie* the steamer is chargeable with fault." And at p. 385 it is said that "only in *extreme* cases, such as are supposed will rarely if ever occur, will a departure from the rule be allowed; and that it will not be relaxed in any case where it properly applies."

The Johnson; 9 Wallace, 146.

At page 153, His Honor, Justice Clifford, delivering the opinion of the Court, says :

"Rules of navigation are obligatory upon vessels approaching each other from the time the necessity for precaution begins, and they continue to be obligatory as the vessels advance, so long as the means and opportunity to avoid danger remain. They are not strictly applied to a vessel which is otherwise without fault, in cases where the proximity of the vessels is so close that the collision is *inevitable*."

The Fannie; 11 Wallace, 238.

A schooner and a steamer were approaching each other on Chesapeake Bay, on nearly parallel lines, with a difference of only half a point in their courses. The lights of both were burning brightly, and each discovered the other in ample time to avoid collision, had either changed its course. The schooner kept her course, and the steamer was held to be alone in fault, The Court says :

"The duties of vessels approaching each other, as these vessels were, are too well defined to need more than a simple statement. The steamer was bound to keep out of the way of the schooner, and to allow her a free and unobstructed passage. Whatever was necessary for this, it was her duty to do, and whatever obstructed or endangered the schooner in her course, it was the duty of the steamer to avoid. There was but a single obligation resting on the schooner. It was *passive* rather than active—*the duty to keep her course.* If, therefore, the schooner did not change her course, so as to embarrass the steamer and render it impossible, or at least difficult, for her to avoid a collision, there can be no doubt that the steamer *alone* is answerable for the damages."

It was contended that the schooner was in fault in respect to her lookout. At p. 243, the Court thus disposes of this objection :

"We do not think it worth while to discuss the question whether the lookout on the schooner was sufficient. If it was not, it can make no difference, for the want of a proper lookout did not contribute to the disaster. *If the schooner held her course, it was all that the steamer had a right to require, and, whether she had a proper lookout or not, it was her duty to do precisely what she did.*"

This case, we submit, fully sustains the decree of the Circuit Judge in the case at bar.

It will be claimed by the appellant, however, that because the Goodnow was not in actual motion when seen by the barque, it was the duty of the latter to take active measures

to avoid the tug. But this conclusion does not follow. The tug had full steam on; her colored lights were burning brightly. She proclaimed, "in the language of the sea," that she could at any moment move either backward or forward. She thereby invited the barque to hold her course. By exhibiting the lights of a steamer under way, she is to be held responsible to the same extent, and in the same degree, as if actually in motion. And the very fact that the *Goodnow* was a *tug*, and of a class of steamers which are capable of being started forwards or backwards almost instantly, is a sufficient reason for applying to her the rule with more than usual strictness, although she was not actually in motion.

As to our lookout, we say, that under the case of the *Fannie*, the barque cannot be held in fault, even if we admit that he was negligent. But we do not admit that he was in any degree negligent; on the contrary, we claim that he was dilligent and attentive to duty.

The City of Paris; 1 Ben., 174.

A sailing vessel was sought to be charged with fault in a collision with a steamer because she had no proper lookout. The District Judge conceded this to be the fact, and yet found the steamer to be solely in fault. At p. 182, he says.

"I have not overlooked the fact that the schooner was not keeping such a lookout as is required of a sailing vessel when moving across a crowded harbor. But with ever so bright a lookout, the schooner would have been bound to hold her course as she did to the luff," etc.

This ruling was sustained by the Circuit Court on appeal, and also by the Supreme Court, in 9 *Wallace*, 634. It is in strict accord with the decisions in the cases of *The Fannie* *The Carroll* and *The Europa*, as well as several other cases cited in our brief, which establish, as a *matter of law*, that in a case like this, the want ot a proper lookout on a sailing vessel can make no difference, if the sailing vessel keeps her course. For, in the language of the Supreme Court, in the case of *The Fannie*, already quoted: "If the barque held her course, it was all that the tug had a right to require, *and, whether she had a proper lookout or not, it was her duty to do precisely what she did.*"

The fact that under the peculiar circumstances of the case, it would have been easy for the barque to have ported or starboarded, can make no difference in the application of the rule.

The Hanser; 7 Blachf,, 288, 290.

The Carroll; 8 Wallace, 302.

A schooner and sailing vessel discovered each other at a distance of several miles. The schooner made no effort to change her course until the collision was inevitable, and was held to be without fault. The Court says she was not blameable, because she was obliged to keep her course.

"She could not choose, *because the law had chosen for her.* It is otherwise with the steamer." P. 306: "These rules were established in the interests of commerce, for the protection of life and property, and *must be observed* They require that the *steamship*, from the moment that the sailing vessel is seen, shall watch, with the highest dilligence, her course and movements, so as to be able to adopt such timely measures of precaution as will necessarily prevent the two boats coming in contact."

The Potomac; 8 Wallace, 590.

The Court says that in such cases the sailing vessel has rarely been adjudged at fault.

"The law casting the greater responsibitity on the steamer, on account of her motive power, and the sailing vessel having an easy duty to perform, it has been generally found, upon investigation, that the collision was the result of a relaxation of vigilance on the part of the officers of the steamer."

The Corscia, 6 Blatchf., 90: affirmed 9 Wallace, 630.

Two steamers, *The Corscia* and *The America*, were approaching upon intersecting courses, the America having *The Corscia* on her starboard bow. It was therefore the duty of the former, under Art. XIV., to keep out of the way of *The Corscia;* and under Art. XVIII. it was the duty of the latter to keep her course. The pilot of *The America* held his course until nearly across the bows of *The Corscia*, when, seeing the risk, he stopped and backed his boat. *The Corscia*, about the same time, instead of keeping her course, *starboarded*, for the purpose of passing astern *The America;* but as the America was then backing, the vessels collided. It was urged that, under the circumstances, the case came within the qualifications of Art. XIX., and therefore the Corscia was not in fault

for changing her course. And Justice Nelson, at the Circuit, said he had no doubt that her pilot and master acted honestly under this belief when the order to starboard was given. "But," he adds, "I cannot forget that they should not have forgotten that it was the duty of the America to give way, and that of their vessel to keep her course; and as there was opportunity for the America to take measures for the fulfillment of this duty, it was a fault in the pilot and master of the Corscia not to have acted on this view." He therefore held the Corscia to be altogether in fault, and upon appeal this Court, in 9 *Wallace*, 630, affirmed the decree, upon the ground that the Corscia was in fault for assuming to perform a duty which devolved on the America, under the rule.

This case, upon principle, fully justifies the conduct of the Sunnyside. Like the Corsica, it was her duty to hold her course. Had she ported, there would probably have been a collision had the tug started forward; and the same consequences would have followed had she starboarded, to pass astern the tug, had the latter backed. To attempt to avoid the tug by either porting or starboarding would have been an assumption by the barque of a duty which devolved upon the tug, for which she would have been condemned under the case of the Corsica.

It is clear that there was no obligation on the part of the barque to change her course when she *first* discovered the tug. The fact that the tug was not in motion can make no difference. As already stated, she was waiting for a tow. She belonged to a class of vessels which "are backed and started with the utmost rapidity," and have an "extraordinary dexterity in avoiding vessels close aboard, and consequently beyond all others risk nearness of approach." There was no time, after the danger was apparent, that the tug could not have avoided the barque a hundredfold more easily than could the latter have changed her course. Therefore, had the barque assumed the duty of avoiding the tug, she would have been much more clearly guilty of a fault in doing so than was the Corscia in the case last cited.

The Louisiana, Taney's Decisions, 602.

A steamer and a schooner were approaching in opposite and nearly parallel directions. The wheelsman of the latter watched the steamer, intending to keep the schooner on her course, until the vessels were within three or four hundred yards of each other; when his alarm got the better of his judgment, and he put his helm down, and so brought the schooner across the steamer's course. His object was to avoid the steamer. But the schooner was held to be *solely* in fault, notwithstanding it was in the night, and the steamer going twelve miles an hour.

The City of New York, 1 Clifford. 81.

In this case Justice Clifford says :

"In order that the steamer may not be baffled in her purpose, it is the duty of the sailing vessel to *keep her course, as though there was no danger, and if she fail to do so, the fault will in general be attributed to her.* These rules must be *strictly adhered to.*"

The Lucille, 15 Wallace, 676.

A steamer and schooner were approaching on courses parallel, and only about half a point apart. The steamer discovered the schooner at a distance of nearly two miles. They collided stem on. The Court, referring to the cases of *The Carroll* and *The Fannie*, already cited, says :

"A steamer approaching a sailing vessel is bound to keep out of her way, and to allow her a free and unobstructed passage. Whatever is necessary for this it is her duty to do, and to avoid whatever obstructs or endangers the sailing vessel in her course. If, therefore, the sailing vessel does not change her course so as to embarrass the steamer, and render it difficult for her to avoid a collision, *the steamer alone* is answerable for the damage of a collision, if there is one." And referring to the positions and courses of the vessels in the case of *The Lucille*, the Court says: "Upon this state of facts, the duty of the sailing vessel was to continue upon her course, *leaving it to the steamer to avoid the collision.* It was the plain duty of the steamer *to accept this reponsibility, and to assume that such would be the action of the schooner.*"

The Governor, 1 Clifford, 96.

In this case it was urged that the schooner *might* have avoided the steamer, by a slight change of her course:—the same argument which is now urged by the appellant in respect to the barque. But the Court says, that suggestions of

this kind, under the circumstances, are entitled to very little weight. The collision occurring in good weather, and at a place where there was no want of sea-room, it is clearly a case where the rule applies that the sailing vessel *shall* keep her course, and leave it to the steamer to avoid a collision.

The William Young, Olcott, 91.

Held, that a sailing vessel is not *justified* in departing from her course, upon the mere *probability* of encountering danger with an approaching steamer. She is only justified in doing so when the danger of collision is imminent.

Under the proofs in this case, the officers of the barque had a right to assume that as soon as the danger became imminent, the tug would be active, and get out of her way. And not till then would the barque, under any circumstances, be *even justified* in changing her course.

But there was no time when the tug, to all appearances, could not have gotten out of the way a thousand-fold more readily, that the barque could change her course. That the officers of the barque were misled by the lights of the tug, into the belief that the tug could and would, at the proper moment, get out of the way, there can be no doubt. And we submit, that it does not lay in the mouth of the appellant, to impute as a fault to the barque, that she did not foresee that the tug would disregard her own duty.

The Wenona, 19 Wallace, 41.

Speaking of the rules applicable to a steamer and sailing vessels approaching, the Court, at p. 52, says:

That the "rules are obligatory upon such vessels when approaching each other from the time the necessity for precaution begins, and they continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remains. They do not apply to a vessel required to keep her course after the approach is so near that collision is *inevitable;* and are equally inapplicable to vessels of every description, while they are yet so distant from each other, that measures of precaution have not become necessary to avoid a collision."

The following English cases show that the rules of navigation upon which we rely are quite as rigidly enforced in England as in this country; and they fully sustain the decree of the Circuit Court in this case.

The Test, Eng. Admr.: 5 Notes of Cases, 276.

Collision between two sailing vessels, *The Test* and *The Mayflower*, both close-hauled, but the former being on the larboard tack, was required to keep out of the way. This she did not do. It was urged, however, as against the Mayflower, that she *might have* avoided the collision if she would; and that she was therefore also in fault upon the principle "that you are not to adhere to strict rules, but avoid an accident if possible." But Dr. Lushington said:

"That is a doctrine, however, to be *very carefully watched*. I do not mean to say that any vessel is justified in coming to collision if she can escape it. * * * But it would be a dangerous doctrine to hold, without evidence, that the Mayflower, whose duty it was to keep her course, ought to have deviated from that rule, and given way, where there are no circumstances established by evidence to show that she ought to have done so. I cannot conceive that any thing would be more likely to lead to mischievous consequences than to suppose that a vessel, whose duty it is to keep her course, should *anticipate* that another vessel will not give way, and so give way herself. The consequence would be that there would be no certainty. The *certainty which results from an adherence to general rules is, in my opinion, absolutely essential to the safety of navigation.*"

The George, 5 Eng. Admr.: 5 Notes of Cases, 368.

Referring to the case of *The Test*, Dr. Lushington again says:

"Nothing, I repeat, would be more mischievous, than for a vessel which ought to keep her course to suppose that the other vessel would not do her duty, and therefore alter her course. This would lead to all sorts of mischief."

The Superior, 5 Eng. Admr.: 5 Notes of Cases, 607.

Held, That a vessel is not justified in departing from the rules of navigation, although it might have happened, under extraordinary circumstances, that by so doing a collision would have been avoided. An exception to the general rule must be most satisfactorily proved.

The Vivid, 5 Eng. Admr.: 7 Notes of Cases, 127.

A steamer collided with a sailing vessel which she did not discover until they were so near together that it was too late to avoid a collision. Counsel for the steamer urged the same argument which the appellant now urges; viz, that the sailing vessel might, by a change of course, have avoided the steamer, and therefore she was in fault for not making an effort so to

do. But the Court held otherwise, and condemned the steamer as alone in fault. Dr. Lushington, in his opinion, says that should a sailing vessel take upon herself to get out of the way of a steamer, it would lead to the chance of infinitely more collisions than take place at present. He says:

"The steamer knows that it is her duty to get out of the way. The other vessel knows her duty, namely, that she is to keep her course; and if there were to be changes, in the manner suggested by counsel, on the part of vessels close-hauled, the consequence inevitably would be more collisions."

Of course, the rule as between steamers and sailing vessels must be the same, whether the latter is going free or close-hauled.

The Imaganda Sara Clasina, 5 Eng. Admr.: 7 Notes of Cases, 579.

A barque close-hauled collided with a Dutch vessel which had the wind free. The barque, seeing that the other vessel did not give way, and fearing collision, starboarded instead of keeping her course. Before doing so she hailed and signaled the Dutch vessel to keep clear, but the latter did not port until within a cable's length of the barque. *Held*, That even under these circumstances the barque should have kept her course, and as she did not, she was alone in fault for the collision.

The Europa and Bartlett, 2 E. L. & Eq., 557.

The Bartlett, a sailing vessel, was sought to be condemned for want of a lookout. On appeal to the Privy Council it was said:

"That *prima facie*, a party entitled to keep his course has nothing else to do but keep his course. That was the position in which the *Charles Bartlett* was placed: *she keeps her course.* * * * *That being so, we can impute no blame to her; and we are of opinion that if all the passengers and crew had been engaged in looking-out, it could have made no difference at all.*"

"The same principle disposes of the point whether she was not to blame for not having heard the *Europa* sooner. Now, on that subject, we think, with reference to that, the circumstance that she *was keeping her course* is very important, because a ship keeping her course *is only bound to go on and keep her course*, not anticipating that other persons are coming. If she had heard something was coming, she would have been entitled to consider that it would come so as not to do her damage."

We submit that, upon this principle, if the *Bartlett* had discovered the lights of a steamer at a distance, in her pathway, she would have been equally "entitled to consider that the steamer would get out of the way." No higher degree of vigilance on her part would have been required in the one case than in the other.

It was further urged that the ship was in fault, because her lookout allowed his attention to be called to the men engaged in coppering her rail. But their lordships say they can pay no attention to that argument: "His duty in looking out was to walk with his eyes to the horizon; but that does not mean that he is not to turn his eyes off and see what a man is doing. All these expressions, 'lookout,' are to be taken in the common sense."

We submit that this case completely disposes of the criticism which the appellant makes as to the conduct of both the lookout and the mate of the Sunnyside, and exonerates them from all blame.

The City of Antwerp and the Frederich, 2 P. C., 25.

Lord Westbury, p. 30, says: "It cannot be too much insisted on that it is the duty of a steamer, where there is risk of collision, whatever may be the conduct of the sailing vessel, to do everything in her power that can be done consistently with her own safety to avoid collision.

The Warrior; 3 Law R. Admr. & Ec., 553.

V.

IN ORDER TO CONDEMN THE BARQUE, IT IS NOT SUFFICIENT THAT IT BE SHOWN THAT A CHANGE OF COURSE ON HER PART WOULD HAVE AVOIDED THE COLLISION. IT MUST ALSO BE SHOWN THAT HER OFFICERS KNEW, OR THAT THEY, BY THE EXERCISE OF ORDINARY CARE, COULD HAVE ASCERTAINED THAT THE TUG WOULD NOT GET OUT OF THE WAY, AND THAT A CHANGE OF COURSE ON THE PART OF THEIR VESSEL WAS NECESSARY.

We submit that the barque was bound to exercise only what, under the circumstances of the case, would be ordinary care and caution; and that the libellant is not entitled to

recover, unless he *proves* the fact that the there was a want of ordinary care on part of the barque. He must demonstrate from the *evidence*, that the appearance and situation of the tug were such, as would indicate to an ordinarily prudent navigator, that a change of course on the part of the barque was a necessity: in other words, he must prove that the position and appearance of the tug were such as to show *clearly*, to the mate of the Sunnyside, that the tug would not obey the rules, and that a departure from the rule, on his part, was demanded. In all this the *onus probandi* is wholly with the appelant. All doubt is to be resolved against him.

We insist that the record discloses no such evidence. The circumstances all point the other way:

1. The steamer was a *tug*, lying in the path of vessels going up and coming down the lake.
2. She had full steam on.
3. She had the lights of a steamer under way.
4. The barque was brilliantly lighted, and could have been easily seen by the tug at a great distance.
5. There was nothing to hinder the tug from starting forward or backward, at any moment.
6. The tug gave no signal or warning to the barque, indicating any necessity for a departure from the rules.

Now, under this state of facts, what was the duty of the mate of the barque—his legal duty as a seaman? Was it to assume that the tug would disregard the law, or that she would observe it? Was it his duty to change his course, simply because the tug, when discovered, was not under way? This cannot be true. He knew that the steamer was a tug; he knew that it was a common practice for vessels of her class to lie in wait for sailing vessels, and not move until the sailing vessel is in close proximity to them; he knew that with her powerful engine, the tug could at any moment be moved forward or backward; he knew that out of many thousands of instances where similar vessels have lain in the same way, not one in the whole history of navigation was ever known to have failed in the performance of her duty. And in the language of the Circuit Judge, "The officers of the barque had a right,

therefore, to repose not only upon the statutes of the country, but upon the peculiar power and long practice of this class of ships to perform, in just these circumstances, the duty which the law imposes."

The rules prescribed by Congress, as well as the decisions of the Courts for more than thirty years, *required* the barque to hold her course until it became evident to her officers that the tug, notwithstanding she proclaimed to the barque, in the language of the sea, her ability, at any moment, to get out of the way, would make no effort to do her duty. But when did that moment arrive? How near to the tug was it the duty of the barque to approach, upon her course? Shall we say two, four, six, or eight hundred feet?

There is no evidence from which the Court can find that it would have been possible for her so to have changed her course, after coming within that distance as to clear the tug But under the circumstances it was a matter of impossibility for the officers of the barque to measure the distance between them and the tug, which was moving two miles an hour before the wind. Their vessel was going nine miles an hour, with the wind nearly aft. "And," as the Circuit Judge again well says, "these conditions rendered an immediate discovery of the precise moment when the tug, by a few turns of her wheel, would move slightly ahead or astern, as she should elect, utterly impossible—if life depended upon it, it could not be done. She would have to pass several times the distance necessary to avoid the barque, before her movement could be preceived by the lookout."

In the Court below, counsel conceded that the barque would be justified in keeping her course until within 400 or 600 feet from the tug. And the gist of the case made by the appellant is, that after coming within that distance, her officers did not ascertain the necessity of a change in her course, and act accordingly.

It is a sufficient answer on our part to say, that, as already argued, the *onus probandi* is with the appellant, to prove that by ordinary care, the pilot of the barque could have ascertained the *necessity* of such action on his part, and this must be shown

beyond all reasonable doubt. But no such proof is to be found in the record. All that the Court can do, if it finds the barque in fault, *is to infer* what the appellant is bound to establish by affinative proof.

But we insist that the inference, from the facts proved by the record, is directly the other way. If the barque had the *right* to keep her course until within 400 or 600 feet from the tug, then it was her *duty*, under the rules, to do so.

But how did the matter present itself to the pilot of the barque? At the time his vessel was going at the rate of nine miles an hour? To run 600 feet it would require little more than a *single minute*; and within *that time* the officer of the barque would be compelled to consider and determine which of three things would be best for him to do. First, whether to port and go ahead of the tug; or second, to starboard and pass astern of the tug; or third, to keep on his course. Each was attended with danger. If he had *ported*, a collision would probably have resulted, had the tug moved forward; and the same result would have followed had he starboarded, if the tug had moved backward; and in either event the barque would be condemned, under the ruling of this Court, in the case of *The Corscia*, already cited. If the officer mistook his duty, it was an *error* on his part and not a *fault*. The time was brief. His vessel was running rapidly; the danger was imminent. The wheel of the barque was at once put hard-a-port, but the vessel could not then swing far enough to avoid striking the tug. It was wholly the fault of the tug that the vessels were brought into such peril; and will the Court say that, under these circumstances, the officer of the barque was guilty of bad seamanship, or that he committed a clear maratime fault, in not sooner discovering that the tug was not going to obey the law, and in not changing his course, so as to avoid the tug, in less than a minute? Where is the case which will sustain such a finding? Will not your Honors believe rather that under the circumstances, it was not *possible* for the mate of the barque to discover that the tug would not attempt to get out of the way, until the collision became inevitable? Again we repeat, it is not enough for the appellant to prove

that the mate of the barque could know that the tug, when discovered, was not under way, but he must prove that the mate knew, or by ordinary dilligence could have ascertained, that the tug — notwithstanding the lights she displayed, and notwithstanding the requirements of the law — would remain motionless.

The following cases show that the exercise of *ordinary* care is all that the law demands of a vessel situated as the barque was, in this case; and unless the evidence is sufficient to prove a want of such care, she is to be held blameless.

Williamson vs. Barrett, 13 How. 101.

This is a leading and a familiar case. It was a collision between two steamers—one ascending and the other descending the Ohio river. It was the duty of the latter to stop her engines and float, at a suitable headway, leaving the ascending boat at liberty to choose her course and pass either ahead or astern. The descending boat followed the rule, but it was insisted that if the collision could have been avoided by reversing her engines and backing, it was her duty to do so, in addition to stopping and floating; and because she did not back she was to be held in fault. The Court, however, held that all which the law requires is ordinary care, under the circumstances. In reference to the duty of the boat to back, at p. 109, the Court says:

"The fact that it would have prevented the catastrophe is not "enough. Circumstances must be shown that would make it the "*duty* of the master to give the order." "Now it could not be known, at least there is nothing in the case to show that it was known to the master of the descending boat which of the two courses open to her the other intended to adopt. If she determined to pass his bow, undoubtedly reversing his engines and backing his boat would have been a very proper maneuvre; but if she determined to cross his stern, the movement would have been improper, and might have been disastrous. Either a forward or backward movement, under the circumstances, would have embarrassed the operations of the other boat, as the master had a right to assume that the descending one would adhere to the usage of the river, and leave him free to make his choice of course."

P. 110. "Before the neglect to make that movement [backing] could be charged as a fault, it should have appeared that the master *knew* the colliding boat intended to pass his bow." In the absence

of such *knowledge*, her proper position was that which the usage of the river prescribed, namely, to stop her engines and float, *leaving* the other the choice to pass across her bow or stern. *This was his plain duty.*"

We submit that the rule, in *Williamson vs. Barrett*, is clearly applicable to the case at bar. In the absence of *knowledge* on the part of the officers of the barque that the tug intended not to move at all, or that she intened to move only in a certain direction, it was "*his plain duty*" to hold his course.

The Clement, 2 Curtis, 368.

A collision occurred between a brig and a schooner, the rule requiring the former, under the circumstances, to get out os the way, which she failed to do. It was contended that the libellant should not recover, because his vessel did not do all she was bound to do to avoid collision after the danger became apparent, but simply held her course. Judge Curtis, however, held the brig to be *solely* in fault. He says:

> Under the rule, the libellant was only in the right, in acting upon the assumption that the brig would be so steered as to keep out the way, "but *he was bound to act* upon that assumption and keep "his course, unless he saw there would be no probable chance of a "collision if he disregarded the rule. Undoubtedly a rule is not to be "followed if it is *apparent* a collision *must* ensue from an observance "of it, and will be avoided by disregarding it. But considering the great importance of a steady observance of the rules of navigation, "and the danger of allowing departures therefrom, I shall be found "slow to condemn an observance of these rules, and shall require a "*clear case* demanding a departure from it to be proved before I de-"clare it to have been a fault to observe the rule."

The Eastern State, 2 Curtis, 144.

A steamer in fault for starboarding, instead of porting, as required by the rule, claimed that the other steamer, with which she collided, was also in fault for not departing from the rule. But it was held that to sustain this claim it must be proved that the vessel obeying the rule ought to have *perceived* that there was *no probable chance* of collision if she departed from the rule.

The Ariadne, 7 Blatch., 213.

A brig with an improper light was sunk by a steamer, and her owner libeled the steamer, claiming that by extraordinary

diligence the latter might have seen and avoided the brig notwithstanding the defective light. The libel was dismissed. At p. 213. Judge Woodruff says:

"But vessels have a *right* to assume that other vessels, if in their neighborhood, are acting in obedience to the statute regulations; and where the negligence of the sailing vessel, and her failure to comply with the statute, have led the steamer into danger of collision, it is not for the sailing vessel to insist that, by more than usual vigilance, she might nevertheless have been discovered at a few yards greater distance, and to claim contribution on that ground."

These remarks, we submit, apply far more forcibly to the case at bar, where a *tug* has violated a statute regulation, and has led a sailing vessel into danger of collision.

The Supreme Court, in 13 *Wallace*. 475, upon a different view of the facts, found both vessels in fault. But its decision in no manner affects or detracts from the legal principles laid down by Judge Woodruff.

The Scotia; 7 Blatchf., 308: Affirmed, 14 Wallace, 176.

The Berkshire, a sailing vessel, with only a white light low down at her anchor stock, was mistaken by the Scotia for a steamer five miles distant. Had the Berkshire displayed the lights required by law, the fact of her being a sailing vessel and in close proximity would have been revealed to the Scotia. The latter, acting upon the belief that the Berkshire was in fact what her light indicated, ported, and soon after stopped and backed her engines. It was urged that her officers *might* have discovered the character and position of the Berkshire, and, that had they *starboarded* and backed sooner the collision would have been avoided. But the Scotia was held to be without fault, she having been deceived by the light of the other vessel. In the District Court it was said:

"In reference to the Berkshire as a steamer, it was the duty of the Scotia to port, and that she had the *right to suppose* that the Berkshire, as a steamer, would also port as required by the rules. Her duty toward the Berkshire, as a sailing vessel, was to keep out of the way. * * * The Berkshire having declared, by the language of the sea, to the Scotia that she was a steamer, cannot be permitted to impute as a fault to the Scotia the adoption by the latter of the movements which would have been proper if the Berkshire had in fact been a steamer." Judge Woodruff, in the Circuit, affirming this decree, says: "That upon discov-

ering the Berkshire's light, it was the duty of the Scotia to see if there was *reason* to apprehend danger." "If she saw the light and observed it diligently, without having *reasonable* grounds for apprehending collision, *no duty to either slacken speed or change her course was created.*"

Let us apply this rule to the Sunnyside. Her officers saw the tug with the lights of a steamer in motion. They had no *reasonable ground* to apprehend a collision, and therefore they were not bound to change their course.

Judge Woodruff further says:

"It was night. The distance of the Berkshire at that instant could not be known. If the Scotia attempted to go to port, it is not at all improbable that she would meet the ship while turning; while by turning to starboard there was a like uncertainty. Her officers must choose. They did what seemed best in a moment of peril. At p. 341, it is said that the Berkshire did in fact mislead the Scotia, and "that she ought not to be permitted to allege fault in the latter in acting according to an honest judgment, and according to the rule of navigation applicable thereto."

The Supreme Court, 14 *Wallace*, 182, affirming the decree of the Circuit Court, says:

"If, now, it be considered that the Scotia had been misled by the nature and location of the light on the Berkshire, which indicated that the ship was at a much greater distance than she was in fact; that consequently the peril came upon her suddenly, leaving short time for deliberation, it would be unjust to impute to her as a fault that she did what she ought to have done had the approachiug vessel been in fact a steamer, and that which at all events *seemed* most likely to avoid a collision. Certainly it was not her fault that she did not know the Berkshire to be a sailing vessel." P. 183. "We think that the Scotia had a right to conclude that the Berkshire was a steamer rather than a sailing vessel. Such was the information given her by the ship's white light." P. 184. "And we think that her [the Berkshire's] breach of duty in these respects misled the officers of the steamer and therefore under obligation to pass on the port side. *If so, the collision was solely due to the fault of the ship.*"

There can be no doubt that the officers of the Sunnyside were misled by the breach of duty on the part of the tug, and if so, the collision was solely due to the fault of the tug.

The Continental, 8 Blatch., 3.

A propeller, without proper range lights, was mistaken for a sailing vessel, and was therefore held in fault for the collision which ensued. But it was claimed in her behalf, that her

position and course were such that the officers of the Continental might have discovered their mistake; that the fault of the propeller did not excuse them from the exercise of ordinary care and skill. It was held that while the legal principal involved is correct, yet when a vessel, clearly in fault, invokes its application, the burthen is upon her, of showing *very clearly* that the party misled thereby might, nevertheless, by the exercise of *ordinary* skill, have avoided the collision, or corrected the misapprehension.

"The faulty party cannot, for his own protection, demand from the other extraordinary dilligence and skill. All he can require is ordinary care, under the actual circumstances of mistake caused by his own fault." P. 7.—"Approaching vessels have a right to expect compliance with the law, and exercise their judgment accordingly. If they actually exercise proper vigilance and skill, and are in fact misled, they are not responsible that, under circumstances *apt to create doubt*, their *judgment* was in fact deceived. It is against precisely such errors that the law was designed to guard, and precisely such errors the neglect of its observance is likely to produce."

The Favorita; 8 Blatchf., 539. Affirmed, 18 Wallace, 598.

A steamship in fault because upon an improper course, sought to hold the Manhassett, a ferry-boat, with which she collided, also in fault, because the latter stopped and backed when she might have escaped by holding her course. But the Circuit Court held that:

"Her pilot was acting in good faith in a situation of great peril; and, an opinion formed *after the event*, which should pronounce his judgment *erroneous*, ought not to be decisive of fault on his part, casting upon the libellants the loss. It is a familiar and well settled rule, that when a vessel is placed in imminent jeopardy by the fault of another, the discretion which her marriners are called upon instantly, in the very jaws of peril, to exercise, to effect a deliverence, is not to be *closely criticised nor their conduct to be condemned, unless very plainly negligent or unskilful.*"

The Supreme Court, in affirming the decree of the Circuit Court, say that it may or may not be true, that had the Manhassett advanced instead of stopping, she would have cleared the steamship. It was a question whether to advance, or stop and back; and the emergency was so great that there was no time to deliberate upon the choice of modes of escape.

"In such a moment of sudden danger, caused by the misconduct of the Favorita, the law will not hold the pilot of the Manhassett—acting in good faith—guilty of a fault, if it should turn out after the event, that he had chosen the wrong means to avoid the collision, unless his seamanship *was clearly unskillful.*"

And we submit, that in order to find the barque in any degree in fault in this case, it is not enough for the Court to say now, after the event, that it would have been more skillful for her pilot to have ported sooner than he did. We must look at the case as it presented itself to the pilot on the deck of his vessel at the time. If he acted "in good faith," his vessel is not to be condemned, "unless his seamanship *was clearly unskillful.*" No greater injustice can be done than to allow this libellant, who has, himself violated the plainest requirements of the law, and who, to the most unpardonable fault in the management of his vessel, has added the *crime of perjury*, to recover from the owner of the barque compensation for any portion of the damages of this collision, for which he himself is solely, legally and morally responsible. He was the master of his own vessel, and liable for the faults which she committed. They were his own faults. He should, therefore, be estopped to ask the Court to strain with hypercritical search, to find some probable fault on the part of the vessel which he deceived and brought into danger. There can be no division of damages here, unless the fault of the barque is clearly and conclusively proven.

The Comet; 9 Blatchf., 323.

This was a colision between the Spray and the Comet. The District Court found both vessels in fault. The owners of the Comet alone appealed. Held that as the owners of the Spray had not appealed, it must be conceded that she was in fault. The Court, however, discusses the *degree* of her fault at length, "because of its importance to the future inquiry whether the Comet was also in fault." And at p. 329, in pointing out the kind of proof which is necessary to be made by a vessel in fault, in order to condemn the other, the Court says:

"When the libellants come into Court, themselves showing negligence and want of skill, and seek to cast the burthen of the conse-

quences *in part*, upon another vessel, there is some presumption at least adverse to their claim, and they may be *held to clear proof* of contributing negligence or fault in the management of the other vessel. Their own negligence sufficiently accounting for the disaster, and it should not be enough that they make the care and skill of the other vessel doubtful."

The Esk and Gitana, 2 Law Reports, Adm. Eccl. 350

The Esk displayed the lights of a vessel at anchor. The Gitana supposed her to be at anchor. and manoeuvered accordingly. By close observation the fact might have been discovered that the Esk was in motion; but she was held to be solely in fault for the collision which ensued, because her lights deceived the Gitana.

Taylor vs. Harwood, Taney's Decisions, 444.

"The omission of a known legal duty is such strong evidence of carelessness, that in every case of collision I should hold the offending vessel *altogether* in fault, unless clear and indisputable evidence established the contrary."

Saltousal vs. Stocton, Taney's Decisions, 21.

"If a man unlawfully places another in a situation which compells him to undergo one of two hazzards, and forces him to choose on the instant, between them, he necessarily gives him the right of selection, and must be responsible for the consequences, although the most fortunate alternative was not adapted."

The applicability of these two decisions, by Chief Justice Taney to the case, at the bar, is apparent:

1st. The tug was guilty of an ommission of a known legal duty, in not getting out of the way, nor attempting to do so.

2d. By reason of this ommission of a known legal duty, she placed the barque under the hazzard of determining, upon the instant, what course to adopt.

Notwithstanding the general rule of the Admirality is to divide the damages in case of mutual fault, still the rule must have its exceptions. This seems to be recognized in numerous cases, of which "*The Comet*, 9 *Blatch.*, 329, *The Catherine*, 2 *Hagg.* 145," and "*The Test*, 5 *Notes of Cases* 276" are examples. These cases seem to justify us in claiming, as a rule of law applicable to the case at bar, that whenever a party has *willfully* exposed himself and others to peril, in violation of the positive requirements of the law, he is estopped to claim contribution to any damages which he may suffer thereby.

At all events they fully sustain the rule laid down by the Circuit Judge, (Folio 191) that "When there is gross and criminal departure from well settled rules, and an absence of all common care on the part of the libellant, he should not be entitled to recover, even though he succeeds in proving a slight fault against his adversary." This rule is consistent with the plainest principals of natural justice, and we think it cannot fail to commend itself to your Honors in the decision of this case.

VI.

THE GROSS FALSITY OF THE CLAIM MADE BY THE APPELLANT IN HIS LIBEL, AND IN THE TESTIMONY WHICH HE HAS PRODUCED TO SUSTAIN HIS CASE, IS A PROPER SUBJECT OF CONSIDERATION IN DENYING HIS RIGHT TO RECOVER.

We have already sufficiently commented upon character of this claim, as sworn to by the appellant, in this libel, and by his officers and men in their depositions. That they have sworn untruely, none will question; that they have committed *willful perjury*, we think no impartial mind can deny. The case is different from one where the owner of an injured vessel, who was not present at time of the disaster, and is therefore, compelled to rely upon the information of others, mistates the facts in his libel, Here the appellent was both owner and master, and was on board at the time. When he swears to the libel and to the protest as being "true in all respects," he acted upon his own knowledge derived from his own personal observation, or from facts ascertainable by him at the moment of the disaster.

It seems to be just and proper that this Court should discourage such attempts to recover damages from an innocent party by denying the relief sought by the appellant. At all events, the Court should hesitate to reverse the decree of the Court below, at the request of a party who shows such a record as is shown by the appellant in this case.

The Mabey and Cooper, 14 Wallace, 204.

The damages suffered by the Sunnyside were slight, being only $200, while those of the tug were upwards of

$14,000. The parties will therefore, in fact, be called to contribute in very unequal proportions, if the Court shall divide the damages, according to the ordinary rule in cases of mutual fault, such a decree would be "a severe sentence" against the appellee, and is another reason why, under the peculiar facts of this case, the decree of the Circuit Court should be affirmed.

The case of *The Gray Eagle*, 9 *Wallace*, 505, was mainly relied upon by the apellant, in the Court below. We think it does not conflict with the decree appealed from. The *Perseverence* had lost her colored signal lights in a storm, and was mistaken by the *Gray Eagle* for a ship at anchor. But her sails could have been seen at a distance of a quarter of a mile. Her course *carried her across the bows of the Gray Eagle, from port to starboard*, and, had the officers of the latter not been grossly negligent, they would have discovered their mistake, and would have learned that the Perseverance was under way.

In conclusion, we would call attention to what is said by the Circuit Judge, on concluding his opinion in the Court below, folio 197:

"We think the judgement referred to [18 How, 591,] and the rules best for the safety of navigation, establish the right of the Sunny side, under the circumstances which were presented to the lookout to keep her course up to the point when the collision became inevitable. She then did all in her power to avoid it. That there was no fault in the master for returning to his post, or in the lookout, standing on the forecastle of his heaving ship, in the night, with no guide object between him and the light, that he did not discover the difference between two miles an hour and five, or in distance between six hundred feet and two hundred. Carelessness on the part of the libellant, which, if life had been lost, was undeniably criminal, can cast no such extraordinary duty upon the approaching ship."

We submit that the decree of the Circuit Court should be affirmed.

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